

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	40.0

UNOFFICIAL

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to give my strongest possible recommendation for Cosima Schelfhout to be a clerk in your chambers. I have had the pleasure of knowing Cosima for the past two years at Columbia as a student in my seminar, the Jurisprudence of War, as well as the faculty supervisor of her note and her independent research project with the Kosovo Specialist Chambers. In all three capacities, I found Cosima creative, hard-working, and a genuine pleasure to work with. She is an avid researcher and clear writer. And I have been consistently impressed by her, exceptional, legal acumen, dedication, and work ethic.

I first taught Cosima in the fall of her second year at Columbia, where she was an exceptional student. As we explored the President's War Powers and the application of the Constitution abroad, Cosima could consistently be relied upon to participate meaningfully in class discussions, to ask pertinent and incisive questions, and to engage both respectfully and meaningfully with her fellow students on what were often very contentious topics. In our brief conversations before and after class, I was impressed by her earnest enthusiasm for the subject and the law more generally.

Cosima has demonstrated an outstanding ability to conduct thorough legal research and distill complex legal concepts into clear and concise written analyses. For her term paper, Cosima produced a superb and original study of the duties that the Geneva Conventions impose upon states in their interactions with non-state armed groups. It was one of the best and most memorable papers I have graded in the decade I have taught at Columbia, and the fifteen years I have taught in the legal academy overall. Unsurprisingly, Cosima received an A.

I also had the privilege of serving as Cosima's note supervisor during her second year. I was instantly impressed by the originality of her proposal to study the legal obligations that states incur to civilian populations as they withdraw from conflict situations. This was on the heels of the United States' withdrawal from Afghanistan, and so the subject was topical as it was neglected by other scholars. And over the course of the year, Cosima proved herself to be diligent, never satisfied, and yet a genuine joy to work with. She worked independently, was receptive to feedback, and was always as happy to accept good suggestions and as she was tactful in rejecting bad ones. The result was a brilliant synthesis of international treaties, customary law, history, and legal commentary.

I continued supervising Cosima when she was hired as an intern for a defense team representing a Kosovar politician accused of war crimes before an international tribunal in the Hague. Cosima acquired her role on the team independently of Columbia and worked diligently through the university bureaucracy to ensure she received credit for her work. Over the course of several months, Cosima routinely sent me the work she completed for the internship, including draft motions and research memos. Her supervisors, the British Barrister Ben Emmerson and American Attorney Andrew Strong, also provided me with glowing feedback. And it was obvious why.

Over the past two years, in these diverse settings, I have gotten an excellent impression of Cosima's many skills. In addition to her talents, she has demonstrated an exceptional ability to manage her time and many burdens diligently. It is a sign of her professionalism and maturity that I never once had to "follow up" with her in any context. Instead, she proactively sent me her work, arranged for meetings well in advance, and was always punctual and prepared.

Finally, I would be remiss if I did not say a few words about Cosima's interpersonal skills. She is a genuine pleasure to work with. To talk with her is to be struck by her refreshingly earnest curiosity, her professional maturity, and her genuine friendliness. Combined with her obvious intellectual gifts and work ethic, she is precisely the kind of person who thrives in collaborative environments. Given the right opportunities, she will be a leading light of the profession in the decades to come.

In short, having taught Cosima and supervised her for the past two years, I cannot recommend her highly enough. I say this not only for her benefit but because she will be an invaluable asset to you and the legal profession. I give her my highest recommendation.

I am happy to support his candidacy further or answer any questions by phone (1.212.252.2142) or email (mp3373@columbia.edu).

Sincerely,

Michel Paradis

Michel Paradis - mp3373@columbia.edu

PAUL SHECHTMAN
335 Greenwich Street, Apt. 2C
New York, NY 10013
917-796-5123

April 18, 2023

To Whom It May Concern:

I am writing to recommend Cosmina Schelfhout for a clerkship. Cosmina was my student at Columbia Law School in Evidence and Criminal Adjudication and received an A in both courses. Her exams were among the highest in each class and showed a complete command of the material, as did her class participation.

Cosmina approached me after class one night to talk about her experience as an intern at the U.S. Attorney's Office for the Southern District of New York in the summer after her first year in law school. (I did two stints in that Office, the second as Chief of the Criminal Division.) Her enthusiasm was evident. She also told me about working in the Hague and her interest in human rights law. As a result, I arranged for her to meet with a former Southern District AUSA who had worked in the Hague, and the two hit it off; the meeting proved enjoyable for them both. What is plain is that Cosmina takes initiative: she wants a career as a litigator, most likely in the public sector, and she has used her time in law school (and law school summers) to advance that goal.

Cosmina has all the other characteristics that make for a good law clerk: she is unpretentious and has a keen sense of humor. Although she did no writing for my classes, her extensive background in journalism suggests that she will not fail you on that score. High grades and a winning way are a receipt for a first-rate law clerk, and I have no doubt that Cosmina will be just that. I recommend her to you without reservation.

Sincerely,

Paul Shechtman

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to provide a very enthusiastic recommendation for Cosima Schelfhout, of Columbia Law School's JD class of 2023, who is an applicant for a clerkship in your chambers. I have known Cosima in multiple contexts during her law school studies and can attest to her outstanding qualifications and suitability to serve as your law clerk. This letter updates my letter initially prepared in April 2023, which was submitted via OSCAR prior to receipt of Cosima's final paper for my Spring 2023 class and prior to the award of final honors to the class of 2023 at graduation. These latest developments confirm my enthusiasm for Cosima's application, and I address them toward the end of this updated letter.

Cosima took my course in International Law in the Spring 2022 semester, during her second year in law school. This was a medium-sized class of about 35 students, in which it was possible to get to know the students reasonably well and appreciate their strengths and weaknesses. Cosima impressed me early on for her willingness to contribute to class discussions, in which she demonstrated thorough preparation of difficult materials and insights into the theory and practice of international law; over the course of the semester, she ranked near the top in overall class participation. My favorable impressions were confirmed by her excellent performance on the written components of assessment for the course, consisting of a research exercise with mandatory and optional parts, and a blind-graded examination. Cosima turned in one of the very best research exercises, which, like the examination, was anonymously graded. The mandatory part of the research exercise instructed the students to locate bilateral and multilateral treaties with relevance to the Russian armed attack on Ukraine and to correlate treaty commitments with voting patterns in the United Nations General Assembly on a resolution deploring the attack and demanding withdrawal of Russian military forces. The optional part entailed research into treaties on suppression of crimes of international concern. The submission also included a reflective essay on the results of the treaty research. When the veil of anonymity was lifted, it was no surprise that Cosima's paper had achieved high marks on all components of the research exercise. Her blind-graded exam answers likewise placed her in the group qualifying for the highest grades. Based on all measures of evaluation, she was awarded the grade of "A," one of only a handful of "A" grades awarded in that class.

In light of her superior performance in my Spring 2022 class, I invited Cosima to serve as my teaching assistant for the Fall 2022 International Law class. In that role, she conducted weekly review sessions with the students, held periodic TA office hours, and assisted in the students' exam preparation. She carried out those responsibilities capably and I was very pleased with her work.

In the summer of 2022, when I lectured at The Hague Academy of International Law, I reconnected with Cosima who was then serving as an intern with the Kosovo Specialist Chambers based in The Hague, working with the defense team on a case involving war crimes in the former Yugoslavia. In that context, I learned of her interest in criminal law and encouraged her to develop that interest through future research and writing in her third year of law school.

In the 2022-2023 academic year, not only was Cosima my Fall 2022 teaching assistant, but I interacted with her through the Salzburg Cutler Global Fellows program, for which she was competitively selected to represent Columbia at a two-day seminar in Washington and to present her work-in-progress on a substantial research paper at a workshop in which I was a faculty commentator. For the seminar, she presented a paper with the title "Jus Post Bellum: Ensuring Protections for Civilians in Post-Conflict Environments," which she has developed as a full-scale note manuscript. The note argues for an interpretation of international humanitarian law in which states engaged in armed conflict incur an obligation to exercise due diligence to ensure protection of civilians in the post-conflict environment. Taking the U.S. withdrawal of armed forces from Afghanistan in August 2021 as illustrative of post-conflict problems in civilian protection, she analyzes the various strands of the laws of armed conflict to build the case for legal obligations not only in resorting to war (*jus ad bellum*) and during wartime (*jus in bello*), but also in preparing during war for the phase after wartime: *jus post bellum*. The note is deeply researched with an original and compelling humanitarian argument. It displays her skills at research and writing, which have been further honed through her work as a notes editor of the Columbia Human Rights Law Review.

In the Spring 2023 semester, Cosima took my course on the Constitution and Foreign Affairs and exercised the option to write a research paper in lieu of the examination. As her research topic, she chose the problem of foreign sovereign immunity as applied to criminal prosecution of foreign government-owned corporations – an issue that was pending at the Supreme Court in the *Halkbank* case for most of the semester and resulted in a Supreme Court ruling handed down in April 2023, shortly before the paper was due. That ruling resolved a question on which the Court had granted certiorari – whether the Foreign Sovereign Immunities Act provides immunity from criminal as well as civil jurisdiction – and left other questions open to be decided on remand. Cosima had to do the bulk of her research on this interesting topic before knowing which way the Court would rule; and then after the judgment came down, she had to finalize the paper in a matter of days, focusing mainly on the issues to be addressed on remand. Her analysis considers the open questions of whether customary international law on foreign state immunity binds U.S. states as a matter of federal common law, and also whether the Executive Branch could shield foreign states from criminal prosecutions in U.S. state courts through the vehicle of binding suggestions of immunity. She analyzes these issues against the backdrop of various modalities of constitutional argument, with attention to the Founders' views on creating "one nation" in foreign affairs and historical practice concerning Executive acts to make determinations of immunity binding on state as

Lori Damrosch - damrosch@law.columbia.edu - 212-854-3740

well as federal courts. I was very pleased with the paper, which confirms the views I had previously formed on the basis of her earlier work that she has research and writing abilities at the high level expected of a federal law clerk.

In this class, as in all the other contexts in which I have seen her in action, she was an active contributor in full command of complex material. Because of the high quality of the paper and her class participation, she again received the grade of "A," the highest grade awarded.

My high opinion of Cosima's accomplishments is evidently shared by my Columbia law faculty colleagues, as she has attained academic honors at the James Kent Scholar level, which is Columbia's top bracket of academic distinction and evidence of her qualifications for a top clerkship. Now that her transcript for her final semester is in hand, I am pleased to observe that she has been awarded the Kent Scholar distinction for both the 2021-2022 and 2022-2023 academic years. Only a small fraction of her classmates have earned this high honor twice.

In connection with preparing this recommendation, I had the opportunity to review a packet of materials which Cosima shared with me, which included a paper she had written the previous semester for the Seminar on American Jurisprudence: Judicial Interpretation and the Role of Courts. The title of the paper, "The Inconsistent Case for Originalism," caught my eye and I read it out of interest and for its connections to the themes of constitutional interpretation that are central to my course on the Constitution and Foreign Affairs (in which she was then working on the Halkbank paper; see above). The Originalism paper reviews selected writings on originalism by three of the most influential exponents of that method – Judge Robert Bork, Justice Antonin Scalia, and Justice Clarence Thomas – and shows that each of these authors resorts to non-originalist methods in their advocacy of originalism: that is, they invoke the very methods they criticize – for example, consequentialist arguments – in support of their contention that originalism is preferable to other modalities. It offers an intriguing perspective on one of the central problems of constitutional methodology of recent decades and shows her aptitude for legal writing.

In all the settings in which I have worked with her and learned of her work with others, Cosima has demonstrated the range of qualities that you would want to have in your law clerk. I also know of her passionate interests in human rights, criminal law and procedure, and constitutional law – all of which she will bring to bear in a clerkship. I urge you to invite her for an interview and select her to serve in your chambers.

Sincerely yours,

Lori Fisler Damrosch

Lori Damrosch - damrosch@law.columbia.edu - 212-854-3740

COSIMA SCHELFHOUT

39 W. 105th St., Apt. 1 New York, NY 10025 • 631-903-9481 • cs4007@columbia.edu

I wrote the following paper for American Jurisprudence: Judicial Interpretation and the Role of the Courts, which I took during the fall semester of 3L. The Honorable Judge Richard J. Sullivan taught the course and has generously agreed to act as a reference. In the paper, I argue that originalism's central proponents, namely Robert Bork, Antonin Scalia, and Clarence Thomas, fail to make originalist arguments for the method of statutory interpretation across their many works. In doing so, I categorize the kinds of arguments they employ instead and explore the implications of their reliance on alternative schools of interpretation.

Cosima Schelfhout
 Fall 2022: American Jurisprudence
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THE INCONSISTENT CASE FOR ORIGINALISM

INTRODUCTION

Originalism is a method of constitutional interpretation that looks to the public meaning of the text when ratified.¹ While variations of the method have existed since the founding, originalism took its modern form in the 1980s.² Robert Bork elevated discussions of originalism to the national stage during his U.S. Supreme Court hearings in 1987,³ and by 1991 two Supreme Court justices adhered to the school of interpretation.⁴ Today, Bork, Scalia, and Thomas rank among originalism's central proponents—having advocated for its adoption in opinions and scholarly articles. The authors argue that judges must be bound by the Constitution's original meaning for a host of reasons, including dangers inherent in alternative schools of interpretation (“non-originalist exegesis”),⁵ the structure of the Constitution, and the tendency of judges to “mistake their own predilections for the law.”⁶ Among these reasons, however, one is hard-pressed to find an “originalist” argument for employing the school of interpretation—an argument that the “original meaning” of the Constitution requires judges to employ originalism.⁷

¹ JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 3 (2005) (describing originalism as “an attempt to discover the public meaning [of the Constitution] for those who made it law”). While some “originalists,” such as Raoul Berger, argue that the meaning of the Constitution is grounded in the “subjective intentions of the framers,” Scalia and Bork advocate for a “public meaning” version of originalism. Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 915-916 (1998). While Bork often refers to “original intent” as opposed to “original understanding” in his earlier works, he clarifies in *The Tempting of America*, that he refers to original “intent” as a “shorthand formulation” for “what the public at the time would have understood the words to mean.” Robert H. Bork, *THE TEMPTING OF AMERICA* 154 (1990).

² Boyce argues that Originalism was first coined by Paul Brest in *The Misconceived Quest for the Original Understanding* 60 B.U. L. REV. 204, 204 (1980). He notes that while similar schools, such as “interpretivism” and “intentionalism” may be traced to earlier decades, “[t]he emergence of modern originalism as a consistent theory of constitutional interpretation” developed relatively recently as a response to legal realism. Boyce, *supra* note 1, at. 909-910.

³ O'NEILL, *supra* note 1, at 3.

⁴ *Current Members*, THE SUPREME COURT OF THE UNITED STATES, WWW.SUPREMECOURT.GOV/ABOUT.

⁵ Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L.R. 850, 863 (1989).

⁶ *Id.* See discussion *infra* Section I.A.

⁷ See discussion *infra* Sections I. A.

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Among the sample of works reviewed, Scalia and Bork discuss the original meaning of the Constitution with regard to constitutional interpretation only once and Thomas, who has published less scholarly material on the matter, fails to do so at all.⁸

One might argue that the authors fail to make exclusively or even predominantly originalist arguments for originalism because the public meaning of the Constitution at the time of its ratification did not include an understanding that federal judges would employ originalism. Or perhaps, that it included the opposite: an understanding that federal judges would employ a particular non-originalist interpretative method. The history, however, is inconclusive. While Scalia and Bork point to evidence that some in the legal community embraced an early form of originalism around the time the Constitution was drafted,⁹ several works suggest that early originalism was neither dominant nor consistently applied during the founding.¹⁰

Whether or not the historical record supports the case for originalism, Bork, Scalia, and Thomas' failure to make an exclusively or mostly originalist argument for the method is significant. In eschewing text-based arguments, Scalia, Bork, and Thomas adopt other schools of interpretation of which the authors are especially critical. In doing so, the authors make several important concessions about originalism. First, the authors imply democratic consent for the

⁸ For this paper, I examined the following works of Scalia: Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L.R. 850, 863 (1989), ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012), Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, THE TANNER LECTURES OF HUMAN VALUES; *Original Intent and a Living Constitution: a Conversation between Scalia and Breyer*, SUPREME COURT HISTORICAL SOCIETY, supremecourthistory.org/info/supremecourthistory_society_events. I also examined the following works by Robert Bork: Robert H. Bork, *THE TEMPTING OF AMERICA* (1990); Robert H. Bork, *Original Intent: The Only Legitimate Basis for Constitutional Decision Making*, JUDGES J. (1987); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. (1986); Robert H. Bork, *The Uphill Fight: Can John Roberts Restore the Constitutional Order?* 57 NAT. R. (2005). Finally, I reviewed the following works by Thomas: Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1 (1996); Clarence Thomas, *How to Read the Constitution*, WRISTON LECTURE TO THE MANHATTAN INSTITUTE (2008).

⁹ See discussion *Infra* Section II.A.

¹⁰ *Id.*

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method—a primary justification for the necessity of originalism—may be lacking. Second, the authors suggest that relying on non-originalist methods of interpretation may be necessary when the historical record is unclear. Finally, the authors indicate that other methods of interpretation may be necessary to legitimize certain constitutional interpretations.

While several authors have challenged the historical bases of originalism,¹¹ and some have pointed to the failure of its proponents to make an originalist case for the method,¹² few works have categorized the types of arguments Bork, Scalia, and Thomas rely on instead. Moreover, few have assessed the implications of the authors' reliance on alternative methods of interpretation. As such, an analysis of the implications of originalists' use of alternative interpretive styles is necessary to gain a fuller understanding of originalism and the arguments made in its favor.

I. BASES OF ORIGINALISM

A. *Alternative Methods*

Originalism emphasizes near complete reliance on the text of the Constitution and history, cautioning against consideration of “abstract purposes” and consequences.¹³ In their writings on the subject, however, neither Scalia, Bork, nor Thomas, rely exclusively on the text of the Constitution or the history surrounding its adoption. Rather, the authors look to the Constitution's abstract aims and the practical consequences of employing originalism or failing to do so. Bork

¹¹ See Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. REV. 226, 280 (1988); Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENTARY 159, 160 (1996).

¹² Stephen Breyer, *Tanner Lecture on Human Values* 2-3 (2004).

¹³ *Id.* at 1 (noting that originalism “cautions strongly against reliance on...abstract purposes and the assessment of consequences” and looks instead to “language...structure, history and tradition”); See also, Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639 (2016) (describing the originalism “toolkit” to include, in addition to the text, “founding-era dictionaries, The Federalist Papers, the Convention debates, and debates in the state ratifying conventions”).

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also presents arguments rooted in “common sense” that are largely absent in both Scalia’s and Thomas’ works.

Scalia, Bork, and Thomas reason that judges must adopt originalism because the structure of the Constitution commands it. Scalia argues that the judiciary’s most important function, judicial review, would be rendered futile if the Constitution’s meaning could change over time. For the judiciary to check the other branches, he contends, the Constitution’s meaning must be fixed.¹⁴ Scalia goes on to discuss the purpose of a constitution in a democratic government. He argues constitutional guarantees are designed to “prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable.”¹⁵ He adds that it is the legislature’s role, as opposed to the judiciary’s, to ensure that laws reflect modern values.¹⁶ Bork makes a similar argument. He contends the only way to keep judges from exercising legislative power to bind them by law “that is independent of their own views of the desirable.”¹⁷ He points to that the amendment provision of the Constitution as further evidence that judges may not shift the meaning the Constitution, stressing the provision precludes gradual changes to the text’s meaning over time.¹⁸ Bork also makes a federalism argument in favor of originalism, stressing that the Constitution’s language must be interpreted literally to preserve the delicate federal-state balance of powers envisioned by the drafters.¹⁹ Thomas echoes Scalia and Bork’s separation of powers concerns. Drawing attention to Article III, he stresses that originalism is necessary to give meaning to the Constitution’s assurances of life tenure and an irreducible salary. Such provisions, he argues, ensure the judiciary’s independence—

¹⁴ *The Lesser Evil*, *supra* note 8, 854.

¹⁵ *Id.* at 862.

¹⁶ TEMPTING OF AMERICA *supra* note 8, at 151-155.

¹⁷ *The Uphill Fight*, *supra* note 8, at 3-4.

¹⁸ TEMPTING OF AMERICA at 143.

¹⁹ *Id.* at 139-140.

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independence that would be undermined if judges were freed from the confines of original meaning.²⁰ Thomas also notes the Constitution's failure to provide formal checks on the judiciary's power as evidence that the text of the Constitution must provide a meaningful limitation on judge's power of interpretation.²¹ Finally, and perhaps most significantly, Thomas reiterates Scalia's argument that the authority of the judiciary derives entirely from the "will of the people expressed by the Constitution." Thus, he suggests, judges exceed their authority when they go beyond the text's original meaning.

While the authors rely in part on separation of powers and federalism, Scalia and Bork ultimately frame their arguments as a choice between alternatives; both authors stress the defects of non-originalism and the relative strengths of originalism. Scalia argues non-organist methods lack consistency, as they fail to specify which "fundamental values" should replace original meaning, and ignore the extent to which the expansion of rights often entails the contraction of other rights.²² While originalism is challenging to apply²³ and often "too difficult to swallow,"²⁴ it provides a consistent guide for judges that mitigates the impact of incorrect decisions by tying judges to history and reduces the extent to which judges will "mistake their own predilections for the law."²⁵ In sum, Scalia argues originalism's weakness are "less likely to aggravate the most significance weakness of the system of judicial review."²⁶ Similarly, Bork stresses that originalism is the method best suited to combat the politicization of the courts²⁷ and to confer

²⁰ *How to Read the Constitution*, *supra* note 8, at 2.

²¹ *Id.*

²² *The Lesser Evil*, *supra* note 7, at 852-863.

²³ *Id.* at 856 (arguing that "plumb(ing) the original understanding" of an ancient text is "extremely difficult" because it requires considering an "enormous mass of material" and an evaluation into reliability)

²⁴ *Id.* at 861 (arguing that some original meanings are so out of touch with modern understanding that they must not be sustained by courts if originalism is to be considered a "practical theory of exegesis").

²⁵ *Id.* at 863.

²⁶ *Id.*

²⁷ *Original Intent*, *supra* note 7, at 14 (arguing that if the Constitution lacks a fixed meaning, "there would be no law other than the will of the judge").

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legitimacy to the judicial process.²⁸ While Thomas makes relatively few consequentialist arguments, he stresses that originalism is more likely to produce impartial results, as other methods of interpretation “have no more basis on the Constitution than the latest football scores.”²⁹ Finally, Bork also makes an appeal to common sense, contending that lawmakers generally intend to bind judges to the text “as generally understood at the enactment.”³⁰ As such, he argues, judges should assume the same rule applies the Constitution and adopt “the common, everyday view of what the law is.”³¹

B. An Originalist Case

As evidenced, neither Scalia, Bork nor Thomas relies entirely on originalism to make their case. Scalia and Bork, however, incorporate originalist arguments, among others, in their larger works.³² For several reasons, however, these arguments are unpersuasive.

First, the inclusion of non-originalist arguments alone, alongside originalist accounts, contradicts originalism’s emphasis on text and history. Bork occasionally acknowledges his reliance on other interpretative methods, writing that judges would be required to adopt originalism “[e]ven if evidence of what the founders thought about the judicial role were unavailable.”³³ He explains that even if the founders “rejected” originalism, “we would need to invent it” because “no other method of constitutional adjudication can confine court to a defined sphere of authority” and thus prevent them from assuming legislative powers.³⁴

²⁸ TEMPTING OF AMERICA, *supra* note 7, at 2 (arguing that the rise of non-originalist methods of interpretation, such as living constitutionalism, “delegitimize the law in the eyes of the American people”)

²⁹ How to Read the Constitution, *supra* note 7, at 2.

³⁰ TEMPTING OF AMERICA, *supra* note 7, at 5.

³¹ *Id.*

³² Scalia makes an originalist argument in Chapter 7 of *Reading Law*. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012). Bork makes an originalist argument in Chapter 7 of *The Tempting of America*. Robert H. Bork, *THE TEMPTING OF AMERICA* (1990).

³³ TEMPTING OF AMERICA, *supra* note 7, at 154-155.

³⁴ *Id.*

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Second, neither Bork nor Scalia presents evidence to suggest originalism—or something close to it—dominated at the time of the founding. Scalia, for example, cites two Scottish statutes enacted in the 15th and 16th centuries that forbade jurists from looking into a statute’s “intent and effect,” selections of William Blackstone’s *Commentaries on the Laws of England*, and a James Madison quote from 1821, in which the Founding Father wrote the Constitution should be “fixed and known.”³⁵ Scalia argues the materials signal that originalism is an “age-old idea in [Anglo-Saxon] jurisprudence.”³⁶ While Scalia is correct to suggest the materials prove originalism was an *idea* circulating American jurisprudence at the time of the founding, they fall short of indicating originalism was the predominant form of judicial interpretation practiced during the Constitution’s ratification.³⁷ Unlike Scalia, Bork claims that constitutional interpretation based on original understanding “was once the dominant view of constitutional law.”³⁸ Before making his case, however, Bork concedes that the relevant historical record is spotty, noting that “the debates surrounding the Constitution focused much more upon theories of representation than upon the judiciary.”³⁹ He proceeds to cite evidence from the Constitutional Convention in Philadelphia in which lawmakers stressed the importance of separation of powers and rejected attempts to “give judges a policy making role.” In particular, he references the failed attempt to create a “council of revision,” consisting of executive officials and members of the judiciary, with veto power over Congress.⁴⁰ While Bork’s evidence supports the conclusion that

³⁵ READING LAW, *supra* note 7, at 83-85.

³⁶ *Id.*

³⁷ It is worth noting that in the same text Scalia cites as evidence of Blackstone’s commitment to originalism, the English jurist stresses the importance of considering a statute’s purpose and “spirit.” In describing the proper approach to statutory interpretation, Blackstone writes, “the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it.” WILLIAM BLACKSTONE, 1723-1780 COMMENTARIES ON THE LAWS OF ENGLAND 58 (1962).

³⁸ TEMPTING OF AMERICA, *supra* note 7, at 151-155.

³⁹ *Id.*

⁴⁰ *Id.* at 153.

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framers wanted to insulate judges from politics, it does not support the conclusion that original understanding included an assumption that judges adopt originalism. Further, by relying on the individual statements of lawmakers at the Constitutional Convention, as well as rejected legislative proposals, as opposed to the common meaning of Art. III's text, Bork engages in a purposovist analysis to uncover original understanding.⁴¹

II. CONTESTED HISTORY

One might conclude that Scalia, Bork, and Thomas' limited reliance on history implies the historical record does not support an originalist case for the method of interpretation. Or more significantly, one might conclude it implies the historical record supports an originalist case for another method of interpretation, such as living constitutionalism.⁴² The historical record, however, is not so clear. Raul Berger is often cited for scholarship uncovering founding era support for originalism;⁴³ Berger argues the founders inherited a legal tradition that constrained judges to a "fixed standard" that "assured the Framers their design would be effectuated."⁴⁴ Berger relies upon 18th century English case law, as well as the writings of James Madison and Alexander Hamilton to support his claims.⁴⁵ Similarly, historian Johnathan O'Neill argues that

⁴¹ Eskridge includes rejected legislative proposals and sponsor statements among the evidence typically considered in a purposovist analysis of legislation. He ranks rejected proposals, however, among the least reliable sources of evidence, below committee reports and sponsor statements. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). Bork's reliance on purposovist methods may reflect his reliance on "original intent" as opposed to "original meaning" in certain pieces of his writing.

⁴² Living constitutionalism is a method of constitutional interpretation that assumes the Constitution is a "living" document, capable of "chang[ing] and adapt[ing] to new circumstances, without being formally amended." DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1 (2010). Those who employ living constitutionalism typically consider the text's purpose and the consequences of a particular interpretation, in addition to history, precedent, and Constitution's text. Breyer, *supra* note 11, at 2.

⁴³ Boyce, *supra* note 1, at 956.

⁴⁴ RAUL BERGER, *GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE 14TH AMENDMENT* 402-410 (1977).

⁴⁵ Berger cites the following quote by James Madison: "If the sense in which the Constitution was accepted and ratified by the Nation...be not the guide in expounding it, there can be not security for a consistent and stable government, more than for a faithful exercise of its powers." He also quotes Thomas Jefferson as saying, "our peculiar security is in the possession of a written constitution... let us not make it a blank paper by construction." *Id.* at 403-405.

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“while [18th century] Americans occasionally consulted extrinsic sources, the usual practice, following Blackstone and the English inheritance, sought the originally intended meaning by examination of the constitutional text.”⁴⁶

Several authors, however, have been unable to substantiate such claims. Jack Rakove, for example, reviews founding era statements by Madison and Jefferson that demonstrate a wavering commitment to originalism, arguing the founders employed alternative modes of interpretation when such methods suited their political aims.⁴⁷ Boyce goes as far as to argue that the framers often rejected early forms of originalism in favor of non-originalist methods, such as “conventionalism,” explaining that the “dominant approach” to constitutional interpretation in the 18th and early 19th century was “informed by traditional law and common-law and natural law principles.”⁴⁸ Similar disputes surround Jonathan Gienapp’s recent scholarship into the Constitution’s early history. Gienapp argues the Constitution did not acquire a “fixed meaning” until decades after its ratification, citing disagreements among the framers about the Constitution’s status as a written legal text subject to a specific type of interpretation.⁴⁹ William Baude argues that while Gienapp uncovers “important debates in which prominent people disagreed about the nature and status of the Constitution” his research does not disprove “the dominance of public meaning originalism” so much as it demonstrates disagreement about “established rules.”⁵⁰

⁴⁶ O’NEILL, *supra* note 1, at 15. O’Neill concedes that while “interpreters were not unanimous about the content or proper application of intent...the idea that interpretation...could balance competing policy goals or ‘update’ the living Constitution to his view of contemporary requirements was almost never heard before the late nineteenth century.”

⁴⁷ Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENTARY 159, 160 (1996).

⁴⁸ Boyce, *supra* note 2, at 960.

⁴⁹ JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 4-18* (2018).

⁵⁰ William Baude, *The Second Creation and Originalist Theory*, BALKANIZATION (Oct. 15, 2018) balkin.blogspot.com/2018/10/were-framers-originalists-and-does-it.

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While the historical record neither fully supports nor refutes an originalist argument for a theory of constitutional interpretation rooted in the text's public meaning, the authors' reliance on alternative modes of interpretation, in response, perhaps, to the inconclusive record, is significant.

III. SIGNIFICANCE

One might question whether it matters if originalism's proponents advance an originalist argument in favor of the method. As Bork notes, "[e]ven if evidence of what the founders thought about the judicial role were unavailable," originalism's many benefits—including its capacity to constrain judges from exceeding their constitutionally assigned role—outweigh the benefits of alternative interpretative approaches.⁵¹ Scalia, Bork, and Thomas' failure to make an originalist case, however, is significant for three reasons: the authors call into question democratic consent for the interpretive method, suggest that relying on alternative methods may be necessary when the historical record is unclear, and imply that other methods of interpretation may be necessary to confer legitimacy to certain constitutional interpretations.

A. A Consent-Based Theory

As noted earlier, originalism's proponents argue use of the method is necessary, in large part, because the judiciary's authority to perform judicial review derives from the people's consent to be governed. Thus, Scalia and Thomas argue, when judges adapt the Constitution's meaning to reflect current values, they exceed the authority conferred to them.⁵² In sum, "the

⁵¹ TEMPTING OF AMERICA, *supra* note 7, at 154-155 (arguing that if originalism "were not common in the law...we would have to invent the approach of original understanding...[because] no other method of constitutional adjudication can confine courts to a defined sphere of authority and thus prevent them from assuming powers whose exercise alters...the design of the American public").

⁵² See, e.g., *Original Intent and a Living Constitution*, *supra* note 7, at 2 (arguing that judges must look to original meaning "because it depends on consent, which is what the people agreed to on adoption"); *How to Read the Constitution*, *supra* note 8, at 3 (stressing that "the framers structured the Constitution to assure that our national government be by the consent of the people" and that they did so by limiting each branch's powers).

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people” did not agree to a constitution whose meaning would change over time. Originalism’s unsettled historical basis, however, leaves open the possibility that “the people” did not consent to be governed by a text with fixed meaning. Gienapp’s research, noted earlier, presents evidence to support this claim.⁵³ Such evidence, if generally accepted, would present a serious challenge to the argument that originalism must be adopted to ensure judges adhere to their constitutionally assigned role and perhaps explains why Scalia, Bork, and Thomas are reluctant to rely exclusively on such claims.

Scalia’s understanding of originalism, however, might accommodate such a situation. Scalia argues judges may be afforded interpretative leeway where the Constitution is “*intentionally* vague,” though one must prove the provision’s public meaning was ambiguous “on the basis of textual or historical evidence.”⁵⁴ As such, according to Scalia, evidence to suggest those who ratified the Constitution did not agree to a specific interpretative method would be insufficient to allow judges to deviate from the public meaning of the text, absent evidence the Constitution was “*intentionally* vague” on the subject.

Notwithstanding Scalia’s workaround, one might argue that even without clear evidence of consent, originalism’s many advantages—including its compatibility with constitutional structure and capacity to keep judges’ personal preferences at bay—remain intact. However, arguing that originalism is “preferable” as opposed to “required”—that originalism should be adopted because of its practical advantages, as opposed to its basis in the Constitution—concedes the value of alternative methods of interpretation, namely pragmatism or consequentialism. Moreover, reliance on pragmatism opens up the possibility that originalism’s proponents are a

⁵³ GIENAPP, *supra* note 49, at 121-122 (stressing that “uncertainty over the content and applicability of common law rules of construction reaveled...that it was simply unclear at the time of ratification which rule of interpretation would guide federal judges”).

⁵⁴ *The Lesser Evil*, *supra* note 8, at 861-862.

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victim of their own critique: employing non-originalist modes that allow room for judges to

“write their own preferences into the Constitution.”⁵⁵ For example, one might argue that by

adopting abstract pragmatic and structural arguments in favor of originalism, Scalia, Bork, and

Thomas allowed room for personal preference in their analyses. Several scholars have raised the

similar critique that choosing to employ originalism in the first place often involves a normative

judgment.⁵⁶

C. Historical Gaps & Legitimacy

Scalia, Bork, and Thomas’ failure to rely on exclusively originalist arguments is also significant because it concedes a popular criticism of the model of interpretation: that it fails to

provide adequate guidance in the instance the history surrounding the public meaning of a

provision is unclear.⁵⁷ By considering abstract principles such as separation of powers and

federalism and the practical implications of adopting different interpretative modes, the authors

suggest judges may need to rely on more than text and history when neither provide clear

guidance on the meaning of a constitutional phrase or provision. Curtis A. Bradley and Neil S.

Seigal, argue, for example, that as originalism has become more popular, originalist judges have

become “more receptive to accommodating various non-originalist materials,” including post-

⁵⁵ *Judging*, *supra* note 8, at 6

⁵⁶ See, e.g., David A. J. Richards, *Originalism without Foundations*, 65 N.Y.U. L. REV. 1373 (1990) (arguing that Bork’s endorsement of originalism over “alternative positive models of constitutional interpretation” reflect his “personal interpretative views.”), Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 498 (1981) (“Arguing that in employing originalism, judges necessarily make “decisions of political morality” when they adopt “one conception of constitutional intention rather than another”).

⁵⁷ See, e.g., *Tanner Lecture on Human Values*, *supra* note 8, at 3 (stressing that historical uncertainties “often fail to provide objective guidance”), Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987) (arguing that the relevant history is often unclear enough to account for multiple possible interpretations, allowing judges to make decisions on policy grounds).

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founding historical practice to accommodate for situations in which “original learning in unknown or unknowable.”⁵⁸

By relying on non-originalist arguments to make their case, Scalia, Bork, and Thomas also concede that such arguments may be necessary to garner public support for constitutional interpretations, especially when the history surrounding a provision is unclear. To make their case, to the legal community and public at large, Scalia, Thomas, and Bork argue originalism is not just required by the Constitution, but likely to result in better decisions,⁵⁹ reduce the politicization of the courts, limit the risk that traditional rights will be contracted,⁶⁰ and prevent judges from legislating from the bench.⁶¹ While one might argue that public approval should not influence constitutional interpretation, both Scalia and Bork make appeals to legitimacy in their calls to adopt originalism. The authors contend that originalism is especially attractive because of its capacity to confer legitimacy to constitutional interpretations by grounding judges’ interpretations in the text.⁶² Thus, in relying on alternative methods in their personal scholarly work, the authors suggest original meaning alone may be insufficient to convince the public of the need to adopt originalism on the bench.

III. COUNTERARGUMENTS

One could also argue that the conclusion that Scalia, Bork, and Thomas fail to make an originalist argument is overstated. As described above, Scalia, Bork, and Thomas rely in part on structural arguments, stressing that originalism is the method of interpretation most compatible with the structure of government envisioned by the Constitution. Some originalists argue that

⁵⁸ Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1 (2020).

⁵⁹ *The Lesser Evil*, *supra* note 8, at 863-864.

⁶⁰ THE TEMPTING OF AMERICA, note 8, at 4-10.

⁶¹ *The Lesser Evil*, *supra* note 8, at 865-66.

⁶² *The Uphill Fight*, *supra* note 8, at 3-4; *How to Read the Constitution*, *supra* note 8, at 2.

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constitutional structure, alongside text and history, plays an important role in originalist analyses.

Bork, for example, stresses that the “framer’s intent” should be understood to include a combination of text, structure, and history of the Constitution.”⁶³ Further, Professor Keith Whittington argues originalists often employ “arguments grounded in structures or values implicit in....the constitutional scheme” to clarify constitutional rules.⁶⁴ As such, one could argue that Scalia, Bork, and Thomas are not making concessions about the value of alternative interpretive methods, but rather employing arguments rooted in the Constitutional design to supplement an unclear original meaning.

This argument, however, fails to address two features of the authors’ writings on the subject. First, the critique does not account for the authors’ reliance on consequentialist arguments to advance originalism’s cause. Even if Scalia, Thomas, and Bork, made structural arguments to advance a textual reading, the authors devote near equal attention to the practical advantages of originalism and the dangers of its alternatives.⁶⁵ Second, the authors do not rely on structural arguments to *support* an originalist interpretation. Often considered a form of textualism,⁶⁶ originalism consults the text “as the first piece of evidence” in an analysis.⁶⁷ Scalia, Bork, and Thomas, however, do not “begin with the text” and use constitutional structure to fortify their reading. Rather, the authors often give structural principles self-sufficient weight.⁶⁸ Scalia, for example, argues that originalism alone can justify judicial review, by ensuring judges

⁶³ Robert H. Bork, *Original Intent: The Only Legitimate Basis for Constitutional Decision Making*, JUDGES J., 15 (1987).

⁶⁴ Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 390 (2013).

⁶⁵ See discussion *supra* Section I.A.

⁶⁶ *Id.* at 389 (noting that both Scalia and Lawrence B. Solum “characterize originalism as a form of textualism”).

⁶⁷ *Id.* at 389.

⁶⁸ Thomas, more so than Scalia and Bork, refers to specific constitutional provisions. For example, in arguing that judges must be impartial and separated from the political process, he refers to Article III, Section 1’s good behavior and irreducible salary provisions. Even here, however, Thomas does not quote or discuss the specific constitutional text. *How to Read the Constitution*, *supra* note 8, at 4.

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adhere to the structure of government envisioned by the Constitution, without reference to a

Constitutional provision.⁶⁹ Similarly, Bork argues the Constitution creates a system of democratic accountability that would be rendered meaningless if unelected judges are allowed to legislate from the bench, without tying his analysis to a particular article or provision.⁷⁰

Whittington stresses that constitutional design should only be relied upon to advance an original reading of the text, as it lacks “independent force” in an originalist analysis.⁷¹

IV. CONCLUSION

Scalia, Bork, and Thomas are undoubtedly responsible for originalism’s growth in recent years.⁷² By portraying originalism as not just the most legitimate mode of constitutional interpretation, but also the method most likely to constrain judges and reduce impartiality, the authors have convinced members of the public and judiciary alike of its advantages. In advancing originalism’s cause, however, the authors employ methods of interpretation they often criticize. In doing so, they not only leave room for policy preferences to shape their analyses but concede several of originalism’s central weaknesses. By relying on broad abstract constitutional principles and consequentialist arguments, Scalia, Bork, and Thomas intimate that originalism may provide insufficient guidance when the history surrounding constitutional text is unclear and imply that alternative methods of interpretation may be necessary to confer legitimacy on particular interpretations. Further, the authors’ failure to rely on an originalist argument alone raises questions about the historical record regarding originalism’s popularity during the founding. This, in turn, casts doubt on originalism’s central advantage: its status as the only method of interpretation consented to by those who ratified the Constitution.

⁶⁹ *The Lesser Evil*, *supra* note 8, at 854-855.

⁷⁰ *THE TEMPTING OF AMERICA*, *supra* note 8, at 4-5.

⁷¹ Whittington, *supra* note 60, at 390.

⁷² Eric E. Posner, *Why Originalism is So Popular*, *THE NEW REPUBLIC* (2011).

Applicant Details

First Name	Christopher						
Middle Initial	B						
Last Name	Scheren						
Citizenship Status	U. S. Citizen						
Email Address	christopher.scheren@law.northwestern.edu						
Address	<table> <tr> <th>Address</th> </tr> <tr> <td> Street 233 E Erie St, Apt. 1908 </td> </tr> <tr> <td> City Chicago </td> </tr> <tr> <td> State/Territory Illinois </td> </tr> <tr> <td> Zip 60611 </td> </tr> <tr> <td> Country United States </td> </tr> </table>	Address	Street 233 E Erie St, Apt. 1908	City Chicago	State/Territory Illinois	Zip 60611	Country United States
Address							
Street 233 E Erie St, Apt. 1908							
City Chicago							
State/Territory Illinois							
Zip 60611							
Country United States							
Contact Phone Number	6149676285						

Applicant Education

BA/BS From	Miami University of Ohio
Date of BA/BS	May 2018
JD/LLB From	Northwestern University School of Law http://www.law.northwestern.edu/
Date of JD/LLB	May 10, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Northwestern University Law Review
Moot Court Experience	Yes
Moot Court Name(s)	Julius H. Miner Moot Court Competition (intramural)

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships **No**
Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Recommenders

Delaney, Erin
erin.delaney@law.northwestern.edu
(312) 503-0925

Hesler, Daniel
daniel_hesler@fd.org
(312) 621-8347

Rountree, Meredith
meredith.rountree@law.northwestern.edu
(312) 503-0227

This applicant has certified that all data entered in this profile and any application documents are true and correct.

CHRISTOPHER SCHEREN

233 E. Erie St, Apt. 1908, Chicago, IL 60611 | christopher.scheren@law.northwestern.edu | 614.967.6285

June 19, 2023

The Honorable Jamar K. Walker
U.S. District Court, Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

Enclosed please find an application for a clerkship in your chambers for the 2024-25 term. I am a third-year student at Northwestern Pritzker School of Law and will graduate in May 2024. A clerkship in your chambers would provide an invaluable opportunity to observe a range of litigation strategies, learn from an experienced lawyer, and broaden my understanding of judicial decision-making in preparation for a career as a litigator. I am also excited for the opportunity to live and work in Virginia, as I would be closer to family who lives there.

My law school and work experience has prepared me to make a meaningful contribution to your chambers and the work of the court. As a summer associate at Weil, Gotshal & Manges, I am spending my summer rotating through the litigation and restructuring departments. This has given me insight into high-stakes complex commercial and securities matters. Another formative experience was my internship with the Federal Defender Program for the Northern District of Illinois. Among other tasks, I drafted motions and sections of briefs, authored research memos, prepared correspondence to send to clients, and tracked what charges were considered crimes of violence within the Northern District of Illinois.

My application includes a resume, law transcript, and writing sample, which is a portion of a brief I wrote as part of Northwestern's Julius H. Miner Moot Court competition. Letters of recommendation are provided from:

Professor Erin Delaney, Northwestern Pritzker School of Law
erin.delaney@law.northwestern.edu; 312-503-0925

Daniel J. Hesler, Staff Attorney, Federal Defender Program for the Northern District of Illinois
daniel_hesler@fd.com; 312-621-8347

Meredith Martin Rountree, Senior Lecturer, Northwestern Pritzker School of Law
meredith.rountree@law.northwestern.edu; 312-503-0227

I would welcome the opportunity to interview with you and discuss my qualifications and interest in the position. Thank you for your consideration.

Respectfully,



Christopher Scheren

Christopher Scheren

233 E. Erie St, Apt. 1908 | Chicago, IL 60611 | (614) 967-6285 | christopher.scheren@law.northwestern.edu

EDUCATION

Northwestern Pritzker School of Law

Chicago, IL

Candidate for Juris Doctor, May 2024

GPA: 3.679 (Dean's List All Semesters)

- NORTHWESTERN UNIVERSITY LAW REVIEW, Executive Editor
 - Note, *Sentence Served and No Place to Go: An Eighth Amendment Analysis of Extended Incarceration for Indigent Sex Offenders*, 118 NW. U. L. REV. (forthcoming 2024)
- Research Assistant, Prof. Erin Delaney (researched literature on decolonization constitutions)
- Julius H. Miner Moot Court Competition, Round 3 Best Speaker & Best Brief Finalist (2023)
- Academic and Professional Excellence Program, Peer Advisor
- Federal Bar Association, Co-Vice President of Programming
- Street Law, Inc., Training and Curriculum Vice President

Miami University

Oxford, OH

Bachelor of Arts in Political Science, History, May 2018

GPA: 3.820

- *Cum laude*; Phi Beta Kappa; History Department Honors; Atlee Pomerene Prize
- Miami University Dolibois European Center (MUDEC) (Differdange, Luxembourg)
- Sigma Alpha Mu; MUDEC Student Faculty Council; MUDEC Debate Team

EXPERIENCE

Weil, Gotshal & Manges,

New York, NY

Summer Associate, May 2023 – July 2023

Federal Defender Program for the Northern District of Illinois,

Chicago, IL

Intern, May 2022 – July 2022

- Researched case law, statutes, and sentencing guidelines to support criminal defense
- Assisted in the drafting of legal memoranda, motions for early termination of supervised release, and sections of appellate briefs
- Reviewed and produced summaries of discovery documents, videos, and photographs

Educational Service Center of Central Ohio,

Columbus, OH

Substitute Teacher, October 2020 – June 2021

- Taught lesson plans in public high schools and middle schools
- Monitored student conduct and wrote daily summaries for primary instructors

EF English First,

Changchun, China

Foreign Teacher, August 2018 – August 2019

- Taught English as a second language to individual students and larger groups of young learners
- Trained peers and new employees on teaching methods for demonstration lessons and activities

ADDITIONAL INFORMATION

Interests: Travel internationally on a shoestring budget and try locally owned restaurants serving regional cuisines from around the world

Northwestern

PRITZKER SCHOOL OF LAW

UNOFFICIAL GRADE SHEET

THIS IS NOT AN OFFICIAL TRANSCRIPT

The Northwestern University School of Law permits the use of this grade sheet for unofficial purposes only.
To verify grades and degree, students must request an official transcript produced by the Law School.

Name:	Christopher Scheren	Total Earned Credit Hours:	57.000
Matriculation Date:	2021-08-30	Total Transfer Credit Hours:	0.000
Program(s):	Juris Doctor	Cumulative Credit Hours:	57.000
		Cumulative GPA:	3.679

Term	Term GPA	Course	Course Title	Credits	Grade	Professor
2021 Fall	3.595	BUSCOM 510	Contracts	3.000	B+	Nzelibe,Jide Okechuku
		CRIM 520	Criminal Law	3.000	A	Rountree,Meredith Martin
		LAWSTUDY 540	Communication& Legal Reasoning	2.000	A-	Dodier,Grace
		LITARB 530	Civil Procedure	3.000	B+	Clopton,Zachary D.
		PPTYTORT 550	Torts	3.000	A-	Friedman,Ezra
2022 Spring	3.741	BUSCOM 601S	Business Associations	3.000	A-	Kang,Michael S.
		BUSCOM 605B	Contracts II:Complex Comm Cont	3.000	A-	Markell,Bruce Alan
		CONPUB 500	Constitutional Law	3.000	A	Delaney,Erin F.
		LAWSTUDY 541	Communication& Legal Reasoning	2.000	A-	Dodier,Grace
		PPTYTORT 530	Property	3.000	A-	DiCola,Peter Charles
2022 Fall	3.668	BUSCOM 620	Securities Regulation	4.000	A-	Horwich,Allan
		CONPUB 644	Legislation	3.000	B+	Kleinfeld,Joshua Seth
		CRIM 655	Prisons and Prisoners' Rights	3.000	A	Mills,Alan
		LITARB 601	Legal Ethics & Prof'l Resp	3.000	A-	Muchman,Wendy
		LITARB 616	Pre-Trial Advocacy	2.000	A-	Mayer,Michael P
2023 Spring	3.715	CONPUB 650	Federal Jurisdiction	3.000	A-	Pfander,James E
		CRIM 610	Constitutional Crim Procedure	3.000	B+	Rountree,Meredith Martin
		CRIM 620	Criminal Process	3.000	A-	Rountree,Meredith Martin
		LITARB 608	Litigation,Crises & Strat Comm	2.000	A	Loeb,Harlan A.
		LITARB 670	Negotiation	3.000	A	Gandert,Daniel

Run Date: 6/5/2023

Run Time: 10:26:50 AM

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 19, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Christopher Scheren for a judicial clerkship. Chris is a bright, dedicated, capable individual who will be a welcome presence in chambers for both his intellect and his good nature.

I first met Chris in his 1L year. He was a student in my Constitutional Law course, a required class in the spring semester. From the outset, it was obvious that he was deeply engaged with the material. His questions in class and office hours were perceptive and on point, and he performed extremely well on a very difficult exam. Rather than a typical issue spotter, I provided a series of more general questions that required close reading and structured responses. His was among a handful of exams at the top of the class. He showed particular strength in wrestling with equal protection doctrine and the tensions between the anti-subordination and anti-classification views of the Fourteenth Amendment.

Recently, I have been fortunate to have Chris serve as my research assistant. I am working on a project exploring calls to decolonize constitutionalism and asked him to do a large-scale literature review on the topic. He read and synthesized dozens of articles from a variety of perspectives (methodological, historical, theoretical) and about many different areas of the world. He then presented a coherent and cogent analysis of the themes in the literature. I often ask RAs to do this kind of work at the beginning of a project, and never have I received a more thorough or nuanced result. In addition, Chris has fielded my follow-up questions with succinct and helpful answers, including pushing back and correcting me when necessary. I feel fortunate for his assistance and advice and have every confidence Chris will be an excellent clerk.

It has been a pleasure to get to know Chris in these different contexts. His contributions at Northwestern also include a variety of community service projects, as well as a substantial commitment to mentoring and supporting the first-year law students through our APEx (Academic and Professional Excellence) program. APEx advisors are chosen through a rigorous and competitive process. They work closely with 1Ls to help them navigate through the academic, professional, and personal challenges of law school. It is a special role that requires approachability, empathy, patience, and very good judgment.

If you have any questions or would like to discuss Chris's candidacy further, please let me know.

Respectfully,

Erin F. Delaney
Professor of Law
Northwestern Pritzker School of Law

Erin Delaney - erin.delaney@law.northwestern.edu - (312) 503-0925

FEDERAL DEFENDER PROGRAM

United States District Court
Northern District of Illinois
55 E. Monroe Street – Suite 2800
Chicago, Illinois 60603

June 19, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Letter of Recommendation for Christopher Scheren

Dear Judge Walker:

I had the pleasure of working with Christopher Scheren during the summer of 2022. I am a staff attorney at the Federal Defender Program. Mr. Scheren was an intern with our office. Mr. Scheren was assigned to me full time for 10 weeks, and I worked with him on a daily basis during that time. I had Mr. Scheren work on a number of assignments, and he consistently did an excellent job. The tasks I had him work on varied. Sometimes they were pure legal research projects. Mr. Scheren did well at that. Other times, I gave him complex data to analyze and he came up with sensible conclusions.

I also had him go through discovery materials. I specifically recall a case involving multiple police videos, and Mr. Scheren created summaries which I eventually relied in successfully challenging a four level enhancement the government had sought under the federal sentencing guidelines. Eventually, I had him writing drafts of writing projects where I needed clear reasoning and good writing. This is not something I delegate to most law students.

Finally, Mr. Scheren assisted me in the preparation of at least one appellate brief. Mr. Scheren did a great job. Looking back on the work I did that summer and some of the filings I submitted, I am not sure exactly which parts of which are Chris' and which are mine, but I do recall that I grew to trust Mr. Scheren's work.

In short, everything I know about Christopher Scheren is positive. He is smart, he works hard, he is easy to get along with, he understands when to ask questions, and he is capable of taking charge of a project when necessary. He will be an excellent attorney very soon, and I would recommend him highly to anyone considering him for anything.

Sincerely,

/s/ Daniel J. Hesler

Daniel J. Hesler
Staff Attorney
(312) 621-8347

Daniel Hesler - daniel_hesler@fd.org - (312) 621-8347

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 19, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to recommend Christopher Scheren to you. I taught Mr. Scheren criminal law during the Fall of his 1L year. This Spring, he was in both my Constitutional Criminal Procedure class, which surveys the constitutional regulation of the police via the Fourth, Fifth, and Sixth Amendments, and Criminal Process, a doctrinal class covering bail through habeas appeals. He earned an A in Criminal Law, a B+ in Constitutional Criminal Procedure (an exceptionally competitive class), and an A- in Criminal Process.

Without a doubt, Mr. Scheren has a fine academic record, but in my view, it does not adequately capture the outstanding student he is and the outstanding lawyer I expect him to become. Indeed, that his team's brief was a finalist for the Best Brief Award in the Julius H. Miner Moot Court Competition and that his Note was selected for publication by the Northwestern University Law Review better reflect his abilities than a law school exam.

In each class, Mr. Scheren has been a real pleasure to teach. A very hard worker, he was always prepared for class. For me, preparation means not simply reading the assigned pages, but also thinking about the import of the assignment, about how the cases fit within a larger legal and social framework. By the time he came to class, Mr. Scheren was able to engage in a meaningful way with the classroom discussion. He not only gave the right answers to my questions, but he also asked the right questions about the law.

Mr. Scheren also demonstrated the depth of his engagement with the legal issues as he related course material to the real-life situations he saw in his work at the Federal Defender Program for the Northern District of Illinois. His ability to integrate the more abstract legal questions from our class to their real-world application is in my view the best testament to his abilities.

Finally, I would be remiss if I did not comment on how much I have enjoyed working with Mr. Scheren as a person. He is quick to laugh, self-effacing, and welcomes feedback. I believe he would be an outstanding addition to your chambers.

If you have any questions about Mr. Scheren, please do not hesitate to contact me.

Respectfully

Meredith Martin Rountree
Senior Lecturer
Northwestern Pritzker School of Law

Meredith Rountree - meredith.rountree@law.northwestern.edu - (312) 503-0227

CHRISTOPHER SCHEREN

233 E. Erie St, Apt. 1908, Chicago, IL 60611 | christopher.scheren@law.northwestern.edu | 614.967.6285

WRITING SAMPLE

This writing sample is excerpted from a revised draft of the brief I wrote in the 2023 spring semester for the Julius H. Miner Moot Court Competition at Northwestern Pritzker School of Law. I performed all of the research myself and this version has not been edited by anyone else.

The case arises in the Supreme Court of the United States on appeal from the (fictional) Twelfth Circuit Court of Appeals. I represent the petitioner, Mr. Charlie Pace, who appeals both his conviction and his sentencing level calculation under the United States Sentencing Guidelines Manual. The question presented that is addressed in this excerpt is whether a motion to suppress evidence permits a district court to withhold the one level reduction for acceptance of responsibility under Sentencing Guideline § 3E1.1(b).

I have modified the brief's original structure for this excerpt. In its complete form, there is a statement of the case, a summary of the argument, an argument section that addresses the first question presented, an argument section that addresses the second question presented, and a short conclusion. For the purposes of this excerpt, I have only included the argument section that addresses the second question presented. Sections have not been renumbered.

II. THIS COURT SHOULD HOLD THAT A MOTION TO SUPPRESS EVIDENCE DOES NOT PERMIT A DISTRICT COURT TO WITHHOLD THE ADDITIONAL ONE LEVEL REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY UNDER GUIDELINE § 3E1.1(b).

This Court should reverse the Twelfth Circuit’s holding that affirmed the district court’s withholding of the additional one level reduction under § 3E1.1(b) from Mr. Pace’s sentencing offense level. This Court reviews the decision *de novo*. See *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). Under Sentencing Guideline § 3E1.1(b), a defendant qualifies for an additional one point reduction to his sentencing point total when he qualifies for the two sentencing reduction points under § 3E1.1(a), his offense level is 16 points or higher, and the Government has motioned and stated that the defendant assisted the prosecution by “timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Government and the court to allocate their resources efficiently.” U.S. Sent’g Guidelines Manual § 3E1.1(b) (U.S. Sent’g Comm’n 2018) (hereinafter U.S.S.G. § 3E1.1(b)). The commentary to this guideline, which this Court finds authoritative, states that while the Government must motion for the third point, a decision to not move for the additional point can only be premised on an interest that is identified in § 3E1.1(b). *Id.* cmt. 6; *Stinson v. United States*, 508 U.S. 36, 38 (1993) (finding commentary to the sentencing guidelines is authoritative). This results in § 3E1.1(b) being mandatory unless the Government or district court can show that the defendant did not allow the Government to avoid preparing for trial or forced an efficient use of the Government’s or court’s resources. See *United States v. Divens*, 650 F.3d 343, 346 (4th Cir. 2011). Although a motion to suppress can overlap in content with the substance of a trial, a trial requires additional preparations and preparing for a motion to suppress should not be viewed as synonymous with trial preparations. See *United States v. Marquez*, 337 F.3d 1203, 1212 (10th Cir. 2003). Because the Government admitted they

did no trial preparations beyond preparing for the motion to suppress and Mr. Pace timely pleaded guilty and so did not waste the Government's or the court's resources, this Court should reverse the Twelfth Circuit's holding and rule that a motion to suppress evidence does not permit the district court to withhold the additional one level reduction for acceptance of responsibility under § 3E1.1(b).

A. § 3E1.1(b) is not discretionary, and the one level reduction is mandatory when a defendant satisfies the requirements under § 3E1.1(b).

This Court should rule that a defendant's offense level must be reduced by an additional one level if the defendant meets the requirements listed in § 3E1.1(b). The Government has limited discretion to determine whether a defendant's assistance allowed the it to avoid preparing for trial. *United States v. Divens*, 650 F.3d 343, 346 (4th Cir. 2011). However, once the Government has determined that they were not forced to prepare for trial, the Government must move for the district court to award the defendant the additional one point reduction. *Id.* If upon review of the Government's motion the district court agrees that the Government avoided preparing for trial, then the district court must grant the motion and award the defendant the reduction. *See* U.S.S.G. § 3E1.1 cmt n. 6. Neither the Government nor the district court have the discretion to refuse to award the reduction to a defendant who meets the requirements listed in § 3E1.1(b) and who has allowed the Government to avoid preparing for trial. *See Divens*, 650 F.3d at 346. Because both parties have stipulated that Mr. Pace met the first two requirements listed in § 3E1.1(b) and the Government admitted that it did not prepare for trial outside of opposing the motion to suppress evidence, this Court should reverse the Twelfth Circuit's holding that affirmed Mr. Pace's sentence without the benefit of the additional one level reduction he was entitled to.

1. The plain text and commentary to § 3E1.1(b) shows that the one level reduction is mandatory when the defendant has met the requirements listed in § 3E1.1(b).

This court should rule that the one level reduction under § 3E1.1(b) is not discretionary based on the plain text of the guideline and its commentary. The plain text contains both a discretionary portion (the Government must file a motion) and a mandatory portion (the offense level is decreased if all of the requirements are met). U.S.S.G. § 3E1.1(b); *see also Pace v. United States*, No. 20-1223, at 22 (12th Cir. 2020) (Widmore, J., dissenting). The Government’s discretion is limited to interests identified in § 3E1.1(b)’s language. *See Divens*, 650 F.3d at 346. Commentary note 6 to § 3E1.1(b) clarifies what those interests are—“avoid[ing] preparing for trial” and efficiently allocating the Government’s and court’s resources. U.S.S.G. § 3E1.1 cmt. 6. These interests are satisfied when a defendant timely pleads guilty. *Id.* If a defendant qualified for a reduction under § 3E1.1(a) and his original offense level was at least 16, the additional one level reduction is mandatory unless the Government can justify its denial based on a § 3E1.1(b) interest. *See Divens*, 650 F.3d at 346 (“[O]nce the Government has determined that a defendant has ‘tak[en] the steps specified in subsection (b),’ he becomes entitled to the reduction.”).

The 2003 PROTECT Act added the requirement that the Government must motion for the defendant to receive the additional one level reduction. *United States v. Vargas*, 961 F.3d 566, 574 (2d Cir. 2020). The narrowness of the Government’s discretion is made clear by commentary note 6, which explains that the change was made “[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that *avoids preparing for trial.*” U.S.S.G. § 3E1.1 cmt. 6 (emphasis added). Far from granting the Government absolute discretion over a defendant’s ability to receive the one level reduction under § 3E1.1(b), it merely shifted the responsibility of determining whether the § 3E1.1(b)

interests had been met from the district court to the Government, which is in a better position to assess their own expenditures of resources. This interpretation underlies the Fourth Circuit’s reasoning in *Divens*, which found that the Government’s discretion was limited to deciding whether the defendant’s actions had relieved the Government from trial preparation. *See Divens*, 650 F.3d at 345–46. If the Government avoided trial preparations, then the defendant was entitled to the third point. *See Id.* at 346.

In this case, it is uncontested that Mr. Pace correctly received a reduction under § 3E1.1(a) and his original offense level was sixteen or higher. *Pace*, No. 20-1223 at 9. In addition, the Government admitted that they did not prepare for trial beyond their preparations for the motion to suppress. *Id.* at 24 (Widmore, J., dissenting). Nevertheless, the Government refused to move for the third point. This Court should follow the plain text of § 3E1.1 and the Fourth Circuit in *Divens* to hold that, unless the Government can show that preparing for a motion to suppress is the same as preparing for trial (this brief will show it cannot), then § 3E1.1(b) is mandatory, the Government should have moved for the additional one level reduction, and the district court cannot withhold it.

2. Amendment 775 is applicable and supports a mandatory reading of § 3E1.1(b).

This Court should rule that § 3E1.1(b) is mandatory under the language of Amendment 775. Amendment 775 states “[t]he Government should not withhold such a motion [for the additional one level reduction] based on interests not identified in § 3E1.1” and if the defendant meets the requirements of § 3E1.1(b), the “the court should grant the motion.” U.S.S.G. § 3E1.1 cmt. 6; *Id.* supp. to app. C, amend. 775. This Court should follow the First, Fifth, Sixth, Eighth, and Eleventh Circuits and hold that Amendment 775 is controlling. *See United States v. Adair*, 38 F.4th 341, 360 n.28 (3rd Cir. 2022) (collecting cases). Such a holding would align with this

Court’s decision in *Stinson v. United States*, which held that commentary to the Sentencing Guidelines Manual “is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” 508 U.S. 36, 38 (1993). The rule extends to amended commentary, despite it not being reviewed by Congress. *Id.* at 46.

While a review of the circuit courts provides an inconclusive picture of the exact limits on what the Government can consider, this Court should tie those limits to the core intention of § 3E1.1(b)—avoiding trial preparation and preserving the efficient use of the Government’s and court’s resources. See *United States v. Johnson*, 980 F.3d 1364, 1384 (11th Cir. 2020); *United States v. Rivera-Morales*, 961 F.3d 1 (1st Cir. 2020) (“Quintessentially, section 3E1.1(b) is meant to reward defendants who spare the Government the expense of trial . . .”). This is reflected in the plain language of the Amendment. Before drafting Amendment 775, the Commission studied the language of the PROTECT Act and found “no congressional intent to allow decisions under § 3E1.1 to be based on interests not identified in § 3E1.1.” U.S.S.G. supp. to app. C, amend. 775. On this basis, the text of Amendment 775 clearly states the “government should not withhold such a motion based on interests not identified in § 3E1.1.” *Id.* Because Amendment 775 came in light of the PROTECT Act, which emphasizes *trial* resources, this Court should read Amendment 775, and § 3E1.1(b) generally, to limit the Government’s discretion when motioning for the additional one level reduction to analyzing whether the defendant has caused the Government to expend trial resources.

The Twelfth Circuit suggested that Amendment 775 did not apply to Mr. Pace’s case as the Amendment was limited to resolving a circuit split about whether the Government can withhold a motion for the one level reduction under § 3E1.1(b) because the defendant refused to waive his appellate rights. *Pace*, No. 20-1223 at 13. The court came to this conclusion by reading

Amendment 775 through the substantive canon *expressio unius est alterius*, which allows a court to assume that items not placed on a list were intentionally excluded from it. See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Because the limits on the Government’s discretion in Amendment 775 were followed by “such as whether the defendant agrees to waive his or her right to appeal,” the Twelfth Circuit opined the Amendment only resolved the specific issue of appellate waivers and was otherwise not applicable. *Pace*, No. 20-1223 at 13. That view, however, ignores this Court’s prior holdings that the canon can be overcome by “contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives.” *United States v. Vonn*, 535 U.S. 55, 56 (2002). There are clear indications that mentioning appellate rights did not signal any intention by the Commission to limit the Amendment’s scope to that particular context. Applying *expressio unius* results in such an extreme narrowing of Amendment 775 that it renders the first half of the sentence (“should not withhold such a motion based on interests not identified in § 3E1.1”) surplusage. U.S.S.G. § 3E1.1. supp. to app. C, amend. 775. This violates “the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant,” as it transforms the broad language in the first half of the sentence into a specific order to not consider whether the defendant has signed a waiver of appellate rights. *Kungys v. United States*, 485 U.S. 759, 778 (1988). The Commission made clear that the Amendment should be applied broadly in their “Reasons for Amendment.” The Commission stated “[i]n its study of the PROTECT Act, the Commission could discern no congressional intent to allow decisions under § 3E1.1 to be based on interests not identified in § 3E1.1.” U.S.S.G. supp. to app. C, amend. 775. This plainly indicates the Commission’s intentions for a broad reading of the Amendment, rather than one that constrains it to the limited context of appellate waivers. Both of these reasons provide ample

support for this Court to reject the Twelfth Circuit's use of *expressio unius* and to apply Amendment 775 to this case.

B. A defendant's motion to suppress cannot be the basis for the Government to refuse to motion for the additional one level reduction under § 3E1.1(b).

The core of this appeal is whether the Government or district court can refuse to award a defendant the one level reduction under § 3E1.1(b) because he filed a motion to suppress evidence. Persuasive case law and the plain language of the guideline make it clear that § 3E1.1(b) is designed to prevent the use of trial resources. The case law further suggests that opposing a motion to suppress is distinct from using trial resources. As such, a motion to suppress cannot be the basis on which a defendant is withheld the third sentencing point for acceptance of responsibility under Guideline § 3E1.1(b).

1. Preparing for a motion to suppress is not synonymous with preparing for a trial.

This Court should follow several circuits and hold that preparing for a motion to suppress and preparing for trial are not synonymous with each other. *See, e.g., United States v. Marquez*, 337 F.3d 1203, 1212 (10th Cir. 2003); *United States v. Price*, 409 F.3d 436, 443 (D.C. Cir. 2005); *United States v. Kimple*, 27 F.3d 1409, 1414–15 (9th Cir. 1994); *Vargas*, 961 F.3d at 584. Preparing for trial requires significant work that goes far beyond what is required to oppose a motion to suppress. Even when there is considerable substantive overlap between the two proceedings, “preparation for a motion to suppress would not require the preparation of voir dire questions, opening statements, closing arguments, and proposed jury instructions, to name just a few examples.” *Marquez*, 337 F.3d at 1212. This shows that there is simply much more that goes into preparation for trial than preparing for a motion to suppress, even when there is overlap in the content of the two proceedings.

Several circuit courts have identified this within their case law. In *Marquez*, the Tenth Circuit reversed the district court's refusal to award a one level reduction under § 3E1.1(b) because the defendant had "pleaded guilty only after a long suppression hearing that required the attendance of nearly all of the Government's witnesses." *Id.* at 1210. The Tenth Circuit's analysis focused on whether the defendant had pleaded guilty early enough so that the Government did not waste resources preparing for trial. *Id.* at 1212. Despite a "lengthy suppression hearing" that was attended by many of the witnesses who would have been at the trial, the Government admitted that they did not prepare for trial beyond the work done on the motion. *Id.* The Tenth Circuit found this was insufficient basis for the Government to refuse to move for the third point reduction, as trial preparations require additional work than a motion to suppress evidence, even when there is substantive overlap. *Id.* The Tenth Circuit held that

[W]here a defendant has filed a non-frivolous motion to suppress, and there is no evidence that the Government engaged in preparation beyond that which was required for the motion, a district court may not rely on the fact that the defendant filed a motion to suppress requiring a "lengthy suppression hearing" to justify a denial of the third level reduction under § 3E1.1(b)(2).

Id.

In Mr. Pace's case, the Twelfth Circuit disagreed and held that the Government can choose to not move for the one level reduction under § 3E1.1(b) because it used resources to oppose Mr. Pace's motion to suppress. In support, the court cited to the Fifth and Second Circuits. Recent decisions in both of those circuits cast doubt on that position. While the Twelfth Circuit accurately pointed to the Fifth Circuit's long history of support, the Fifth Circuit recently indicated they would have considered deciding differently if not constrained by *stare decisis*. See *United States v. Longoria*, 958 F.3d 372, 376 (5th Cir. 2020) ("If we were writing on a blank slate, Longoria might have a compelling argument."). The Second Circuit has moved even

further from the position. Both the Twelfth Circuit in Mr. Pace's case and the Fifth Circuit in *Longoria* cite to *United States v. Rogers*, in which the Second Circuit ruled a district court could refuse to grant the one level reduction when "in terms of preparation by the Government and the investment of judicial time, the suppression hearing was the main proceeding in [the] case." 129 F.3d 76, 80 (2nd Cir. 1997). However, although it did not address *Rogers*, the Second Circuit recently explicitly adopted the Tenth Circuit's position in *Marquez* and ruled that a district court cannot deny the one level reduction under § 3E1.1(b) when the Government did not prepare for trial beyond a motion to suppress. *United States v. Vargas*, 961 F.3d 566, 584 (2nd Cir. 2020).

The *Marquez* decision is analogous to Mr. Pace's case and Mr. Pace is entitled to the third level reduction. Like the defendant in *Marquez*, Mr. Pace filed a non-frivolous motion to suppress that overlapped with evidence that would have been presented at trial. Despite the overlapping content, the Government in both *Marquez* and Mr. Pace's case admitted that it did not prepare for trial beyond the work done on the motion. Because a motion to suppress is not in and of itself equal to trial preparation, the Government has not shown that it prepared for trial. Therefore, since § 3E1.1(b) is designed to reward defendants who specifically allow the Government to avoid preparing for trial, Mr. Pace is entitled to the third point on the same grounds as the defendant in *Marquez*.

2. Mr. Pace's actions were not inefficient uses of the Government or the court's resources.

Mr. Pace timely notified the Government of his intention to plead guilty and did not cause an inefficient use of resources by either the Government or the court. What constitutes timely notice is not measured by days, weeks, or hours, but by how they functionally relate to the objectives of § 3E1.1(b). See *Kimple*, 27 F.3d at 1412. As such, a timely notice will ensure the

goals of the provision are realized, specifically that the defendant pleaded guilty early enough so that the Government avoided preparing for trial and both the Government and court were able to allocate their resources efficiently. *See Id.*; § 3E1.1. Efficient use of resources by the Government has a long history of being tied to whether it had to prepare for trial, an interpretation supported by the plain language of § 3E1.1(b). *See Kimple*, 27 F.3d at 1412; *United States v. Lee*, 653 F.3d 170, 174 (2d Cir. 2011).

Because the Government has admitted that it did not prepare for trial beyond the motion to suppress, and this brief has shown opposing a motion to suppress is not to be considered “trial preparation,” the focus is on whether Mr. Pace allowed the court to allocate their resources efficiently. The text of commentary note 6 to § 3E1.1 indicates that the efficient use of court resources refers to scheduling decisions surrounding trial. U.S.S.G. § 3E1.1 cmt. 6. Because Government resources and court resources are part of the same phrase in that note, there is little indication that they are intended to refer to significantly different concepts. Additionally, commentary note 6 states “to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that... the court may schedule its calendar efficiently.” *Id.* While a defendant cannot wait until the eve of trial to plead guilty, “where the proceeding is at the pretrial stage and the district court has not yet expended its resources, the guilty plea may still be timely.” *Kimple*, 27 F.3d at 1413, 1415. Because Mr. Pace was nine days from his trial date and the case was still within the pretrial stage, the district court cannot be assumed to have expended trial resources before Mr. Pace pleaded guilty. Therefore, Mr. Pace’s guilty plea was timely and was not an inefficient use of the Government’s or the court’s resources.

Applicant Details

First Name **Nathan**
 Middle Initial **T**
 Last Name **Schneider**
 Citizenship Status **U. S. Citizen**
 Email Address nschneider427@gmail.com

Address
Address
Street
1910 19th St.
City
Heyburn
State/Territory
Idaho
Zip
83336
Country
United States

Contact Phone Number
2082192396

Applicant Education

BA/BS From **Boise State University**
 Date of BA/BS **May 2018**
 JD/LLB From **Georgetown University Law Center**
https://www.nalplawschools.org/employer_profile?FormID=961
 Date of JD/LLB **May 19, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Georgetown Immigration Law Journal**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/
Externships **No**
Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Recommenders

Augarten, Ian
ian.augarten@maryland.gov
(571) 882-1859

Schoenholtz, Andrew
schoenha@georgetown.edu
202-662-9929

Smith, Paul
paul.smith@law.georgetown.edu

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

Nathan Schneider
425 L St. NW
Washington DC, 20001

Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am writing to apply for a 2024-2025 clerkship with your chambers. I am currently a rising 2L at the Georgetown University Law Center. I have a strong interest in litigation, and hope to further hone my skills and assist your chambers through this position. I have visited Virginia many times during law school, and love the history and culture of the state.

Growing up watching my father, a public defender, I knew I wanted a role advocating for clients in the courtroom. As an aspiring litigator with experience in a variety of courtroom contexts, both state and federal, I believe I would make a strong addition to your chambers. Through my clinic and summer work, I have been fortunate to have experience several practice areas, including state juvenile criminal proceedings, immigration proceedings, and high value civil disputes in federal district court. In addition to my experience as an advocate, my time in Georgetown has also honed my writing skills through my experience in the classroom, and as a managing editor of the Georgetown Immigration Law Journal.

My resume, unofficial transcript, and writing sample are submitted with this application. Georgetown will submit my recommendations from Professors Paul Smith and Andrew Schoenholtz, as well as from my former supervisor, Ian Augarten from the Prince George's County public defender's office. I would welcome the opportunity to interview with you and look forward to hearing from you soon.

Respectfully,



Nathan Schneider

NATHAN SCHNEIDER

120 F St NW, Washington, DC 20001 • (208) 219-2396 • nts21@georgetown.edu

EDUCATION

Georgetown University Law Center

Juris Doctor Candidate

GPA: 3.59

Honors: May Ferro Family Endowed Opportunity Scholarship

Journal: Georgetown Immigration Law Journal, *Managing Editor*

Activities: Human Rights Law Associate Program, Cancer Law Pro Bono project

Washington, DC

Expected May 2024

Boise State University

Bachelor of Arts, *cum laude*, History and Secondary Education, Minor Political Science

GPA: 3.73

Honors: Helen K. McCarthy Memorial Scholarship, Frances Woods Education Award

Activities: Lambda Chi Alpha Fraternity: Secretary, Peace Corps Prep Program, Study Abroad: Aberystwyth, Wales

Thesis: *An Overview of British Racial Rhetoric in the Second Anglo Boer War*

Boise, ID

May 2018

EXPERIENCE

Milbank LLP

Summer Associate, Litigation Track

New York, NY

May 2023- July 2023 (Expected)

- Supported trial preparation efforts in the litigation department through extensive research on Westlaw into state and federal matters,
- Observed trials in the Southern District of New York and took detailed notes to

CALS Asylum Clinic

Student Attorney

Washington, DC

August 2022- December 2022

- Successfully defended a client seeking asylum by appearing before the Immigration Court
- Conducted extensive country conditions research, interviewed witnesses, and coordinated expert testimony
- Wrote motions and briefs

Prince George's County Office of the Public Defender: Juvenile Division

Law Clerk

Upper Marlboro, MD

May 2022- August 2022

- Conducted legal research and investigations for attorneys
- Wrote motions which were submitted to the court
- Interviewed clients and reviewed discovery to gather evidence for trial

Peace Corps Benin

English Teaching Volunteer

Toura and Gbanlin, Benin

June 2018 – March 2020

- Served as a full time Teach English as a Foreign Language (TEFL) teacher instructing students on the use and conventions of the English Language
- Collaborated with Beninese counterparts to plan lessons and improve each other's English teaching skills
- Organized youth development events including a regional English spelling bee and national boy's summer camp

Ada County School District

Student Teacher

Boise, ID

Jan. 2017 – May 2018

- Under supervision, served as a classroom teacher in Government and History Classes
- Designed lesson plans to fulfill state and federal education requirements

Languages and Interests

- French (African dialects: proficient; European dialects: intermediate), Bariba (Novice), Fon (Novice)
- Hiking, running, vinyl record collecting, history (American, European, African)

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Nathan T. Schneider
GUID: 840770006

Course Level: Juris Doctor

Entering Program:

Georgetown University Law Center
 Juris Doctor
 Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Fall 2021 -----							
LAWJ	001	92	Civil Procedure	4.00	B+	13.32	
			David Hyman				
LAWJ	002	92	Contracts	4.00	B+	13.32	
			Girardeau Spann				
LAWJ	005	23	Legal Practice: Writing and Analysis	2.00	IP	0.00	
			Sara Creighton				
LAWJ	008	22	Torts	4.00	B+	13.32	
			Mary DeRosa				
EHrs QHrs QPts GPA							
Current	12.00	12.00	39.96	3.33			
Cumulative	12.00	12.00	39.96	3.33			
Subj	Crs	Sec	Title	Crd	Grd	Pts	R

----- Spring 2022 -----							
LAWJ	003	21	Criminal Justice	4.00	B+	13.32	
			Julie O'Sullivan				
LAWJ	004	21	Constitutional Law I: The Federal System	3.00	A-	11.01	
			Cliff Sloan				
LAWJ	005	23	Legal Practice: Writing and Analysis	4.00	B+	13.32	
			Sara Creighton				
LAWJ	007	92	Property	4.00	A	16.00	
			Audrey McFarlane				
LAWJ	235	50	International Law I: Introduction to International Law	3.00	A-	11.01	
			David Koplow				
LAWJ	611	07	Communication Design & Law: Re-Designing Legal Information	1.00	P	0.00	
			Jacklynn Pham				
EHrs QHrs QPts GPA							
Current	19.00	18.00	64.66	3.59			
Annual	31.00	30.00	104.62	3.49			
Cumulative	31.00	30.00	104.62	3.49			
Subj	Crs	Sec	Title	Crd	Grd	Pts	R

----- Fall 2022 -----							
LAWJ	215	05	Constitutional Law II: Individual Rights and Liberties	4.00	A-	14.68	
			Brad Snyder				
LAWJ	500	06	Center for Applied Legal Studies		NG		
			Andrew Schoenholtz				
LAWJ	500	30	~Legal Drafting		A-		
			Andrew Schoenholtz				
LAWJ	500	81	~Advocacy	4.00	A-	14.68	
			Andrew Schoenholtz				
LAWJ	500	82	~~Classroom Work	3.00	A-	11.01	
			Andrew Schoenholtz				
LAWJ	500	83	~~Clinical Skills	3.00	B+	9.99	
			Andrew Schoenholtz				

-----Continued on Next Column-----

				EHrs	QHrs	QPts	GPA
Current				14.00	14.00	50.36	3.60
Cumulative				45.00	44.00	154.98	3.52
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
----- Spring 2023 -----							
LAWJ	1454	05	Topics in LGBT Civil Rights Seminar	3.00	A	12.00	
LAWJ	165	07	Evidence	4.00	A	16.00	
LAWJ	1832	08	Introduction to Foreign Intelligence Law	2.00	A-	7.34	
LAWJ	361	07	Professional Responsibility	2.00	B+	6.66	
LAWJ	545	08	Financial Restructuring and Bankruptcy	4.00	A-	14.68	
----- Transcript Totals -----							
				EHrs	QHrs	QPts	GPA
Current				15.00	15.00	56.68	3.78
Annual				29.00	29.00	107.04	3.69
Cumulative				60.00	59.00	211.66	3.59
----- End of Juris Doctor Record -----							



NATASHA DARTIGUE
PUBLIC DEFENDER

KEITH LOTRIDGE
DEPUTY PUBLIC DEFENDER

MELISSA PRYCE
DISTRICT PUBLIC DEFENDER
PRINCE GEORGE'S COUNTY

Georgetown University Law Center
600 New Jersey Ave NW
Washington, DC 20001

Re: Letter of Recommendation for Nathan Schneider

To whom it may concern:

I am writing this letter of recommendation in support of Nathan Schneider's application for a judicial clerkship. Nathan was a law clerk with the Maryland Office of the Public Defender in Prince George's County during the summer of 2022. He was assigned to our juvenile division, and I was his supervisor. I found Nathan to be a highly dedicated and thorough law clerk during his time with our office.

Nathan worked on a number of challenging cases within our office. In one case, a young boy was charged with a felony assault on a small girl. There were numerous questions as to the identification of the youth as the perpetrator in the case. In preparing for trial, Nathan wrote a motion in limine regarding the presence of certain witnesses in the courtroom during testimony, to avoid prejudice against our client. The motion was legally well researched and written, but also helped promote the theory of our client's innocence at the opening of the case. Nathan was part of the trial team in preparing various cross-examinations and arguments and we were ultimately successful at trial.

Nathan also worked on a homicide case with a seventeen-year-old defendant. Under Maryland law, a seventeen-year-old charged with homicide is not eligible to be transferred to juvenile court. Nathan worked on a motion challenging of the constitutionality of that provision. He did in-depth research into the legislative history of the law and the historical context of its development, including going to the State Archives in Annapolis to obtain documents not otherwise available. He helped draft an extensive motion incorporating that research. While the motion was not successful, it will be litigated on appeal and possibly create new law in the State of Maryland if successful.

Nathan was a valued member of our defense team when he worked as a law clerk. He collaborated professionally with attorneys, was reliable with his assignments, and wrote clearly and concisely. I believe he would be an excellent contributor to any judge's chambers and would take advantage of the opportunity to continue learning and growing as an attorney,

Sincerely,



Ian Augarten (1306190009)
Assistant Public Defender
14735 Main St.,
Upper Marlboro, MD 20772
(301) 952-2106
ian.augarten@maryland.gov

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to recommend Nathan Schneider for a Clerk position within your chambers. I worked very closely with Nathan as his principal advisor during his time in the Center for Applied Legal Studies (CALS) asylum clinic at Georgetown Law.

Our intensive ten-credit asylum clinic is extremely selective, as dozens of students apply for only twelve seats each semester. The clinic requires teamwork, strategic thinking, and the rapid mastery of both complicated facts and the nuances of immigration law. CALS students represent refugees seeking asylum in the United States. Students assume primary responsibility for representing these refugees, working in pairs to prepare one full asylum case from beginning to end in one semester. Students interview the client; research the human rights record of the country of origin; develop documentary and testimonial records showing the client either suffered past persecution or will suffer future persecution if forced to return; locate and prepare witnesses; and represent the client at a hearing before an asylum officer or a federal immigration judge.

Over the course of the semester, I carefully reviewed and commented on all the documents that Nathan and his partner produced during the process of successfully convincing an Immigration Judge in a deportation hearing that their client merited asylum in the United States. This work included preparing motions, witness affidavits, administrative filings, and a brief with an extensive annotated table of contents highlighting the corroboration. In addition to the written body of work, the clinic included oral advocacy sessions where Nathan and his partner interviewed their client and witnesses, conducted a moot, and ultimately argued their case before an Immigration Judge.

One of the things that stood out to me about Nathan was his commitment to learning and his eagerness to grow as an advocate. Through our weekly case team meetings, I saw him build an understanding of a new area of law with diligence and curiosity, and through revision and hard work, put together a compelling, informative, and legally nuanced brief. While developing the theory of the case, Nathan researched and reviewed dozens of 4th Circuit and Board of Immigration Appeals decisions to determine the most favorable approach for his client. Through this process, Nathan and his partner carefully weighed the strengths and weaknesses of the available precedent. For example, Nathan applied the relevant case law on major elements of asylum, including persecution and imputed political opinion, to the factual record that he and his partner thoughtfully developed. Working from the factual record at hand, Nathan advanced his client's strongest claims, and identified significant challenges likely to be raised by the Homeland Security trial attorney and wove counter arguments into the brief to undermine them.

Nathan's factual research involved a number of important sources. While significant information came directly from interviews with his client, he also reached out to numerous witnesses abroad in different countries, as well as solicited testimony from experts. Nathan supplemented this research with reports about the human rights conditions in the client's home country. To do this, Nathan read many human rights reports from across the world and carefully corroborated his client's claims with secondary sources, all meticulously cataloged and highlighted for the Immigration Judge in an annotated table of contents. Nathan and his partner ultimately culled their extensive research into their client's claims to some 600 pages of corroboration submitted as evidence to the court.

In preparing for litigation, Nathan effectively evaluated the potential avenues that the attorney for the Department of Homeland Security might employ to challenge the asylum claim and prepared legal and factual arguments to counter them. For example, Nathan prepared an exhaustive list of potential bars for asylum which the government might argue, and the legal and factual responses against those arguments. This preparation paid off when the government attorney pressed their client about the one of the greatest points of concern our team had identified in practice and discussion. Nathan's extensive knowledge of the record showed during the trial when he was able to quickly respond to cross examination by the opposing counsel, and effectively and respectfully answer questions from the judge.

While working closely with Nathan, I appreciated his dedication and passion to the project, as well as his receptiveness to suggestions for improvement, his ability to work closely with other student advocates, and his commitment to professionalism and discretion while dealing with sensitive topics. Given the skill and knowledge I have seen in CALS, I have no doubt that Nathan will make a significant contribution as a clerk in your chambers, and I am happy to recommend him for a clerk position in your chambers.

Sincerely,

Andrew Schoenholtz, J.D., Ph.D.
Director, Center for Applied Legal Studies
Director, Human Rights Institute

Andrew Schoenholtz - schoenha@georgetown.edu - 202-662-9929

Andrew Schoenholtz - schoenha@georgetown.edu - 202-662-9929

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Nathan Schneider, of the Georgetown Law Class of 2024, as a candidate for a clerkship in your chambers. Nathan is both a strong candidate intellectually and an incredibly nice person who would fit in well as a judicial law clerk.

I got to know Nathan this past semester when he took my Georgetown seminar, Topics in LGBT Civil Rights. He was an insightful participant in the class discussion, bringing to it his life experience growing up in Idaho and attending Boise State University before spending two years as a Peace Corps volunteer in Benin. I have just graded his end-of-semester paper for the class, which is truly excellent. Nathan had spent the prior semester working with one of our clinical programs – the immigration asylum clinic run by the Center for Applied Legal Studies. In that role, he litigated asylum claims. He then brought that experience to bear in writing a seminar paper discussing the problems with the current standards governing asylum applications based on claims of anti-LGBT discrimination in the home country. The result was a well-written analysis supporting the need for a more explicit authorization of claims in this category.

A son of the Mountain West, Nathan is looking for a clerkship in that region. He has enjoyed the broadening experiences of Peace Corps service and doing law school in Washington, DC but is drawn to return to his native part of the country.

As a former teacher, Nathan is a natural communicator who explains complex concepts in a clear and succinct manner – a skill that will serve him well in his future legal endeavors. He has compiled an already-excellent GPA through three semesters of law school and seems to be on an upward trajectory. I can say with great confidence that he would serve you well.

I would be happy to talk further with you about Nathan as a clerkship candidate. I can be reached at paul.smith@georgetown.edu or 202 258-5669.

Sincerely,

Paul M. Smith

Paul Smith - paul.smith@law.georgetown.edu

Nathan Schneider
425 F st., 20001
Washington, DC
Nts21@georgetown.edu
208-219-2396

Writing Sample

This is a paper I wrote for the class “Topics in LGBT Civil Rights”. This paper also served as my note requirement for my journal, the Georgetown Immigration Law Journal. Working in my clinic, I noticed how the restrictive rules on Particular Social Group claims impact potential asylees, and I wanted to explore how some of the potential solutions could impact different groups of people, particularly the LGBT community.

**The Sixth Ground: Why Adding Gender/Sexuality to the Grounds for Asylum Would
Better Serve the Needs of LGBT Asylum Seekers**

Nathan Schneider

Topics in LGBT Civil Rights

May 15, 2023

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Introduction

On February 4, 2021, President Biden issued a memorandum affirming the United States's support for the LGBT community, and issued a series of directives to the executive branch to support the interests of LGBT people around the world.¹ One of the provisions of this memorandum directed the Department of Homeland Security (DHS) and the Department of Justice (DOJ) to use their respective powers in asylum law to support LGBT asylees seeking refuge in the United States.² Despite these recent efforts by the Biden Administration, however, there is still a great amount of work needed, and the current asylum system set out by the 1951 Convention on Refugees is inadequate to do the job. LGBT asylum seekers, as well as asylum seekers facing discrimination for gendered violence, face unique problems in applying for refuge. Global norms of homophobia and sexism mean individuals in these groups are not protected from persecution in much of the world, even in locations that are considered secure and that are not traditional sources of refugees.³ These problems exist, in no small part, because the global asylum system was developed to address specific problems arising out of WWII and the Cold War, and well before our modern understanding of gender and sexuality.

This paper will argue that the existing protected grounds for asylum that recognized by international law do not meet the needs of LGBT asylum seekers, and that instead the addition of a sixth ground for asylum based on gender/sexual orientation better serves their needs. While asylum claims based on gender and sexuality remain funneled into the “Particular Social Group” (PSG) framework, LGBT asylum seekers will be forced to make their claims under a framework

¹ Memorandum For The Heads Of Executive Departments And Agencies, THE WHITE HOUSE (Feb. 4, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/04/memorandum-advancing-the-human-rights-of-lesbian-gay-bisexual-transgender-queer-and-intersex-persons-around-the-world/>.

² *Id.*

³ Round Table, UNHCR, LGBTIQ+ Persons In Forced Displacement And Statelessness: Protection And Solutions, 4 (June 4, 2021).

not designed for their needs.⁴ Furthermore, homophobia in the asylum process leads immigration officials to interpret the ambiguous, existing laws in ways that cut against LGBT asylees. A new grounds for asylum that are better tailored to meet their needs.

Part I will demonstrate that the PSG ground is insufficient for protecting LGBT asylees due to its ambiguous inception, and especially given how American courts have interpreted the standard. Part II will go a level deeper and argue that LGBT asylees continue to face significant legal barriers because of the PSG ground. Instead, a sixth ground for asylum would better address many of those concerns. Part III will take a humanitarian perspective to show how a sixth ground would support fairness for asylees undergoing the asylum process and reduce their suffering and stress through the process. Finally, Part IV will briefly explain how a sixth ground would bring the United States more in line with the rest of the world's practical application of refugee law.

I. Global Asylum Law and Particular Social Group as a Grounds for Asylum.

LGBT individuals seeking asylum in the United States today are forced to make their case using a legal standard that was developed over seventy years ago and that has been stripped down by United States courts. Following the Second World War, in 1967, the United Nations (UN) created the current global norms for refugees through the Convention Relating to the Status of Refugees.⁵ This multilateral treaty formed the basis for asylum law around the world and enshrined five specific grounds for asylum. One addition, the Particular Social Group, became somewhat of a catch-all for groups for asylees who did not conform to the other groups.

⁴ Michael Kareff, *Constructing Sexuality and Gender Identity for Asylum through a Western Gaze: The Oversimplification of Global Sexual and Gender Variation and Its Practical Effect on LGBT Asylum Determinations*, 35 GEO. IMMIGR. L.J. 615, 618 (2021). Kareff argues that the PSG grounds show a fundamental misunderstanding of LGBT culture and queer theory, forcing asylees to conform to a particular vision of queerness to seek asylum and minimizing the lived experiences of asylees.

⁵ UNHCR, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 1 (2011).

Though this flexibility can sometimes be helpful for asylum-seekers, the PSG category was defined in a vague manner that led to serious questions over who should be considered a refugee. Over the past decades, the United States has tackled this problem through numerous common law decisions by both the Bureau of Immigration Affairs (BIA) and Article III courts. The United States has ultimately built on top of the vague UN standard a comparatively restrictive definition of Particular Social Group that insufficiently protects LGBT asylees.

A. The 1951 Refugee Convention created the Particular Social Group grounds as a flexible but ambiguous tool for refugees.

Many of the issues in asylum law today stem from the limited scope and original purpose of the Refugee Convention of 1951. In the wake of the Holocaust, the Allied powers agreed to provide a system for safety and refuge for those facing discrimination in their home countries.⁶ The newly formed United Nations took charge of the initiative to create the asylum system, culminating in the Convention Relating to the Status of Refugees in 1951.⁷ This convention sought to create a unified, international approach to the global asylum process.⁸

While it was a crucial step in establishing international norms about the treatment of refugees, the Refugee Convention was limited by the historical context of its creation. The convention defined a refugee as a person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁹

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ The Refugee Convention, 1951, 189 UNTS 137 (1951).

The first clause proved a major weakness of the system as new, pressing humanitarian crises surfaced in the Cold War Era. Recognizing that the Refugee Convention was created and ratified with the explicit intention of handling the global crisis created by the Second World War,¹⁰ and in order to address future crises, the 1967 Protocol amended the treaty and removed the first clause to form the current, global refugee regime.¹¹ This framework has been adopted by countries around the world, and many nations have domestic legal standards that conform to the language of the Refugee Convention.¹²

However, defining the edges of the PSG designation has proven a problem since its creation. Discrimination based on race, religion, nationality, and political opinion is often easy to identify, but claims that do not conform to these grounds present grave dangers to potential asylees. Because the needs of asylees often do not fit into one of the four neat boxes provided by the treaty, Particular Social Group (PSG) tends to be the catch-all grounds for many people seeking asylum with claims that do not conform to more directly enumerated grounds.¹³ The standards for a particular social group are ill-defined, and many radically different groups have claimed asylum under these grounds. These include former gang members,¹⁴ members of clan

¹⁰ UNHCR, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, 1 (2011).

¹¹ Protocol Relating to the Status of Refugees, 1967, 189 UNTS 150.

¹² See, e.g., Immigration and Refugee Board of Canada, *Claim Refugee Status From Inside Canada: Who Can Apply?* (Mar. 28, 2023) <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/claim-protection-inside-canada/eligibility.html>; UK Parliament, *Refugees and Asylum-Seekers: UK Policy* (Dec 1, 2022) <https://lordslibrary.parliament.uk/refugees-and-asylum-seekers-uk-policy/>; French Office of Protection of Refugees and Displaced People, GLOSSAIRE (last visited Apr. 2, 2023) <https://www.ofpra.gouv.fr/glossaire/r#538>.

¹³ See Department of Homeland Security, *Roundtable 2: Hot Topics in Asylum: An Examination of Particular Social Group and Other Serious Harm* (Sept. 10, 2020) (including discussions by government attorneys on some of the problems related to using the PSG grounds).

¹⁴ See, e.g., *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009).

groups,¹⁵ and women who have been abused by their partners.¹⁶ It is also the standard grounds for asylum for LGBT asylum seekers around the world.¹⁷

Despite how widely it may apply, the PSG ground remains ill-defined and malleable due to its inclusion as an afterthought in the Refugee Convention. Initial drafts of the UN Convention on Refugees contained only the first four grounds for asylum: race, religion, national origin, and political opinion.¹⁸ At the suggestion of the Swedish representative to the convention, the committee added PSG as the fifth grounds for asylum.¹⁹ The record is unclear on what the drafters intended when they included the grounds, as there was no debate on its inclusion, and the committee agreed upon the amendment unanimously.²⁰ Furthermore, the amendment has no drafter's notes or comments on its inclusion. Thus, scholars can only hypothesize the original intent of the provision,²¹ leaving much up for interpretation by courts.

Given the context of the Holocaust, it is reasonable to assume that the framers of the convention intended the PSG ground as a catch-all for the other groups that were persecuted by the Nazis, such as Romani, prisoners of war, and the mentally and physically disabled. Indeed, given the Nazis' persecution of members of the LGBT community, considering members of the LGBT community a particular social group appears to be consistent with the original meaning of the PSG designation.²² But without drafter's notes, comments, or recorded debate, the intention

¹⁵ See, e.g., *In Re H-*, 21 I. & N. Dec. 337, 337 (BIA 1996).

¹⁶ See, e.g., *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014).

¹⁷ See UNHCR Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 2, HCR/GIP/02/01 (May 7, 2002).

¹⁸ Natalie Nanasi, *Death of the Particular Social Group*, 45 N.Y.U. Rev. L. & Soc. Change 260, 282 (2021).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See United States Holocaust Museum, *Nazi Persecution Of Homosexuals* (last visited Apr. 2, 2023) <https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/nazi-persecution-of-homosexuals> (detailing just some of the persecution that members of the LGBT community faced in the Nazi regime).

behind the text of the Convention remains ambiguous. As a result, courts in the United States have been able to interpret the PSG grounds more narrowly.

B. Because of the ambiguity of the PSG status, common law in the United States has interpreted the grounds in a restrictive manner.

United States courts have interpreted the PSG grounds in a limited manner based on the requirements of immutability and visibility. The PSG grounds is primarily understood through the judicial decision in *Matter of Acosta*,²³ as there is no statute or legislative guideline which lays out what is and is not a PSG.²⁴ In *Acosta*, the BIA held that “persecution on account of membership in a particular social group [means] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.”²⁵ Furthermore, the court held that membership in the group is something that the asylee cannot or should not change—thus setting the standard for immutability.²⁶ The contours of the law depend on the circuit where the asylee is applying for relief, as rulings in different circuits can often have profound impacts on whether or not someone is granted asylum.

One of the key questions from the *Acosta* standard regards the definition of an “immutable characteristic.” The case itself sheds some light on the idea. The BIA denied asylum to a Salvadoran man who was a member of a taxi service collective being targeted by the government, finding his occupation was not immutable, because his job title was within his power to change.²⁷ Edge cases regarding issues such as domestic violence and gang membership

²³ *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

²⁴ See S.Rept 96-256; S.Rept 96-590. The Refugee Act of 1980 is the primary legislative source for refugee law, but it does not dive into the definition of the Particular Social Group, despite naming it as one of the grounds for asylum.

²⁵ *Id.* at 213.

²⁶ *Id.*

²⁷ *Id.* at 212.

show significant unresolved circuit splits about the edges of the standard.²⁸ While there are a few areas where there are well-defined boundaries (family groups are usually considered immutable,²⁹ whereas employment is not³⁰) there is significant room for interpretation when deciding “immutability.”

The *Acosta* standard alone defined PSG until 2006, when the BIA added “social distinction” to the PSG analysis and thus created the visibility requirement in *In Re C-A*.³¹ In addition to the *Acosta* factors, an asylee must be a member of a community that is “recognizable” as a discrete group by others in the society, and which must have well-defined boundaries.³² Yet many of the groups that asylees identify with are concealed from society due to persecution—persecution being the very reason why they may be seeking asylum. Judge Posner, writing for the Seventh Circuit, concluded that the “social visibility requirement makes no sense” and rejected it as an element for PSGs.³³ He reasoned that “a homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible.”³⁴ While the BIA later clarified that groups do not need to meet the requirements for ocular visibility, the standard still requires that the community as a whole recognize the social group as separate from the rest of society.³⁵ In practice, that means that immigration lawyers

²⁸ Compare *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020), with *Gonzales-Veliz v. Barr*, 938 F.3d 219 (5th Cir. 2019). Both cases were issued during AG Sessions’s injunction on domestic violence-based asylum claims. In the First Circuit, they disregarded the AG’s decisions and set a near per se rule allowing gender-based claims. On the other hand, the Fifth Circuit rigidly applied *Matter of A-B-*, a decision that will be discussed at some length later in the paper.

²⁹ See, e.g., *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009). But see *Matter of L-E-A-* (where family was not considered a sufficient grounds, showing that even the exemplar of the PSG category can be insufficient).

³⁰ See *Acosta*, 19 I. & N. Dec. 211.

³¹ *In Re C-A-*, 23 I. & N. Dec. 951, 951 (BIA 2006).

³² *Id.*

³³ *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009).

³⁴ *Id.*

³⁵ *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 227 (BIA 2014).

suggest that clients highlight times they have been recognized in the community to provide the basis of their claim to ensure immigration judges can recognize visibility.³⁶ The United States' additional requirements for the PSG ground have made immigration difficult for many groups, but U.S. case law is troubling for LGBT asylees in particular for the reasons expanded on below.

II. LGBT Asylum Seekers Face a Multitude of Legal Barriers to Relief Which Could be Mitigated or Removed Through the Addition of Another Ground for Asylum.

LGBT asylum seekers face problems that differ from those faced by other refugees. Some of these difficulties come from requiring members of the LGBT community to fit their claims into the PSG analysis, whereas others are compounded by homophobia in American society at large. Not only is the basis of LGBT asylum law shaky at best, but developments in PSG designation independent of LGBT claims have also made life more difficult for asylees. In addition, recent decisions by the Trump Administration have set dangerous precedents for LGBT claimants. While adopting a sixth ground for asylum would not solve all these problems, it would go a long way towards ensuring that immigration judges and advocates would have the tools to handle these challenges.

A. The PSG analysis is flawed as a basis for LGBT claims, as Matter of Toboso-Alfonso as a precedent is outdated and insufficient.

In the United States, gays, lesbians, and bisexuals have been considered a cognizable group in PSG claims since *Matter of Toboso-Alfonso*.³⁷ In this 1990 decision, the BIA reviewed the withholding of removal claim of a man who had escaped Cuba following incarceration for suspicion that he was gay.³⁸ The BIA affirmed the lower court's decision granting a withholding

³⁶ See Immigration Equality, *Challenging Asylum Cases* (last visited April 2, 2023).

³⁷ *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990).

³⁸ *Id.* at 819.

of removal based on the finding that homosexual identity represented a cognizable social group and was therefore proper grounds for asylum.³⁹ The Ninth Circuit held in 2000 that transgender status similarly constituted a PSG, and this rule has broadly been followed outside of that circuit.⁴⁰

While this was a landmark case for LGBT asylum seekers, the holding is rooted in the landscape of LGBT rights in the United States at the time, and serves as a problematic ground for relief because of its reliance on the conduct/identity distinction.⁴¹ Since Cuba was persecuting homosexuals on the basis of their *identity*, rather than enforcing a law that was based on health measures banning sodomy or same sex *conduct*, Cuba's treatment of the asylee was deemed impermissible.⁴² At the time, *Bowers v. Hardwick*, which explicitly condoned sodomy laws focused on homosexual conduct in the U.S., was controlling. This decision by the BIA thus avoided challenging *Bowers* by playing into the conduct/identity distinction.⁴³

However, in the modern day, the decision leaves a large hole with potential for abuse by homophobic immigration judges. All but one of the top five points of origin for LGBT asylum seekers currently has laws that explicitly ban homosexual conduct.⁴⁴ Many of these countries have no corresponding laws regarding expression of sexual orientation.⁴⁵ Under a rigid

³⁹ *Id.* at 823.

⁴⁰ *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000); *see also Doe v. Att'y Gen. of the United States*, 956 F.3d 135 (3d Cir. 2020); *Ayala v. U.S. Att'y. Gen.*, 605 F.3d 941 (11th Cir. 2010).

⁴¹ *Id.* at 821.

⁴² *Id.*

⁴³ *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). There is no right to “engage in homosexual sodomy” as Justice White described it, affirming that state bans on same-sex sexual activity were legal and acceptable in the United States. The direction the BIA took in *Toboso-Alfonso* therefore focuses on actions that would be considered First Amendment issues in the U.S., namely the expression of sexual identity to avoid touching on settled constitutional law.

⁴⁴ *Home Office Asylum claims on the basis of sexual orientation 2021*

<https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2022/asylum-claims-on-the-basis-of-sexual-orientation-2021--2>; Human Rights Watch, *Map of LGBT Laws Around the World*, HUM. RTS. WATCH (last visited Apr. 2, 2023) https://internap.hrw.org/features/features/lgbt_laws/.

⁴⁵ *Id.*

interpretation of *Matter of Toboso-Alfonso*, a gay man seeking asylum from Nigeria would be unable to find relief in the United States, because Nigerian law punishes conduct same-sex *conduct* and not expression.⁴⁶

It is important to keep in mind that the discretionary nature of immigration decisions means judges often do not apply the rules rigidly, and *Toboso-Alfonso* is generally read more favorably for LGBT asylees. Every asylum determination is fact-dependent and depends heavily on the judge.⁴⁷ In fact, an LGBT asylum seeker will usually not face the problems highlighted above. Dicta in other cases indicate that the blackletter law from *Matter of Toboso-Alfonso* is that members of the LGBT community are considered a PSG when seeking asylum.⁴⁸ But the weaknesses of *Matter of Toboso-Alfonso* remain important because it is the final authority on sexuality in asylum cases. While circuits have their own laws on the matter, the BIA is still bound to this 1990 decision distinguishing identity from conduct, despite its limitations. Adopting a legislative solution, such as adding a sixth ground for asylum, would address the weaknesses of *Toboso-Alfonso* and give more explicit and unequivocal instruction to immigration judges.

B. Social visibility and immutability requirements cause significant problems for closeted LGBT asylees, as they often cannot demonstrate their social visibility.

While creative interpretation of precedent poses only a potential risk, social visibility requirements pose a very real present risk to LGBT asylees. Social visibility, paired with the requirement that asylees have already faced persecution in their home country, means that it is effectively impossible to claim asylum as a member of the LGBT community unless the person

⁴⁶ Criminal Code Act § 213 §§ 3 (1990) (Nigeria).

⁴⁷ 8 CFR § 1003.10 (b).

⁴⁸ See, e.g., *Castillo-Arias v. U.S. Atty. Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006).

has been outed, meaning that their community in their home country knew of their true gender or sexuality.⁴⁹ In many countries, same-sex intimacy carries a death penalty, and there is widespread violence against people who merely identify as LGBT.⁵⁰ Uganda, for example, has recently banned LGBT identification in any form. This includes a ban on promoting and abetting homosexuality as well as conspiracy to engage in homosexuality.⁵¹ Simply applying for asylum outside of Uganda as a member of the LGBT community means that an applicant will have already violated Ugandan law, and could be subject to imprisonment upon their return to the country.⁵² Refugees who are completely closeted will have a difficult time proving that they are recognized as a separate group by society.

Sempagala v. Holder highlights the problems closeted asylees face by showing how being closeted in one's home country can lead to consequences in an asylum hearing.⁵³ A bisexual man from Uganda applied for asylum in the United States due to the significant persecution faced by LGBT individuals in Uganda.⁵⁴ He freely admitted to the court that he could not provide evidence that people in Uganda knew of his sexuality, because he had purposefully kept it secret from his community.⁵⁵ The immigration judge determined that he had no well-founded fear of future persecution, and his denial was upheld—he was deported to Uganda.⁵⁶ The process thus creates a catch-22 for LGBT asylum seekers as they are required to out themselves in immigration courts in order to receive any kind of relief, putting themselves at

⁴⁹ See *Sempagala v. Holder*, 318 F. App'x 418 (6th Cir. 2009).

⁵⁰ Human Rights Watch, *Map of LGBT Laws Around the World*, HUM. RTS. WATCH (last visited April 2, 2023) https://internmap.hrw.org/features/features/lgbt_laws/.

⁵¹ Larry Madowo, *Uganda Parliament Passes Bill Criminalizing Identifying as LGBTQ, Imposes Death Penalty for Some Offenses*, CNN NEWS (Mar. 22, 2023) <https://www.cnn.com/2023/03/21/africa/uganda-lgbtq-law-passes-intl/index.html>.

⁵² Charity Ahumuza Onyoin, *A grim return: post-deportation risks in Uganda*, FORCED MIGRATION R. 54 (2017).

⁵³ *Sempagala v. Holder*, 318 F. App'x 418 (6th Cir. 2009).

⁵⁴ *Id.* at 421.

⁵⁵ *Id.*

⁵⁶ *Id.* at 423.

risk if their case is denied and they are deported back to their home country. Thus, while it is possible for LGBT refugees to meet the well-founded fear of future persecution element of the law, it is difficult for them to prove they meet the visibility requirements in the PSG analysis.⁵⁷ For this reason, a separate ground for asylum, removing the social visibility requirement, is critical for LGBT asylees who are closeted in their home countries.

The immutability and social visibility requirements also cause significant problems for bisexuals and people who form relationships with partners of multiple gender identities. In *Fuller v. Lynch*,⁵⁸ the court determined that an asylum-seeker was lying about his sexual orientation as a bisexual man, and dismissed letters from three different ex-lovers that were presented as evidence, in part because the man was married to a woman.⁵⁹ The dissent stated that the trial judge “does not know the meaning of bisexuality.”⁶⁰ As recently as 2022, an immigration judge issued an opinion finding that a Jamaican man was falsifying claims about his bisexuality and therefore not a member of a cognizable PSG; the Third Circuit overturned this decision, finding that the man’s testimony was sufficient evidence of his bisexuality.⁶¹ This relatively recent case demonstrates how immigration judges apply the PSG standard differently for bisexual individuals.

The visibility requirement is a feature exclusive to the PSG analysis. Curiously, other grounds for asylum have no such requirements beyond the burden of proof for past persecution

⁵⁷ See *Sempagala v. Holder*, 318 F. App’x 418 (6th Cir. 2009); see also *Marynenka v. Holder*, 592 F.3d 594, 601 (4th Cir. 2009). It is firmly established that testimony alone can be sufficient to allow for an asylum claim. *Sempagala* is informative about the court’s understanding of this in PSG claims because nowhere in the decision do they say that the applicant’s testimony was not credible. Here they are establishing a higher standard for a PSG based claim than claims made under other grounds. While this decision refers to the Real ID act, it is important to note that the “testimony alone” standard remained well after the act passed in 2004, as is evidenced by *Marynenka*.

⁵⁸ *Fuller v. Lynch*, 833 F.3d 866 (7th Cir. 2016).

⁵⁹ *Id.* at 868.

⁶⁰ *Fuller v. Lynch*, 833 F.3d 866, 874 (7th Cir. 2016) (Posner, J., dissenting).

⁶¹ *K.S. v. Att’y Gen. of United States*, No. 20-3368, 2022 WL 39868 (3d Cir. Jan. 5, 2022).

or a well-rounded fear of future persecution. Even the political opinion ground does not require that the holder of the opinion form some cognizable “group” within their home country.⁶² Thus, adopting a new ground for asylum would remove a significant impediment to LGBT claims by allowing people to rest their claims more heavily on the “well-founded fear of future persecution” element of asylum, rather than proving that individuals in their community would recognize them.

C. Matter of A-B-, a recent decision by the Trump Administration, could potentially be used to target LGBT asylees and show how asylum law is vulnerable to executive meddling.

The Trump Administration highlighted the flaws in the asylum system by testing the limits of accepted law with *Matter of A-B-*, one of the most controversial BIA decisions in decades.⁶³ Until 2017, asylees could seek refuge in the United States by claiming they were escaping domestic abuse in their home country.⁶⁴ *Matter of A-R-C-G-* ruled that “Guatemalan women who were not able to leave their husbands” was a sufficient PSG to stand as grounds for asylum.⁶⁵ If they could demonstrate that the government was unwilling or unable to prosecute their abusers, they had a valid claim for asylum under the PSG designation.⁶⁶ Following the ruling in *Matter of A-R-C-G-*, domestic violence victims from around the world used this legal theory to seek asylum in the U.S.⁶⁷

The law changed in 2017 when then-Attorney General Jeff Sessions issued the decision in *Matter of A-B-* where he held that the group of “Guatemalan women who were not able to

⁶² Guy Goodwin-Gill & Jane McAdam, *THE REFUGEE IN INTERNATIONAL LAW* 119 (5th ed. 2021).

⁶³ See Joel Rose, *The Justice Department Overturns Policy That Limited Asylum For Survivors Of Violence*, NPR (June 16, 2021) <https://www.npr.org/2021/06/16/1007277888/the-justice-department-overturns-rules-that-limited-asylum-for-survivors-of-viol>.

⁶⁴ *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Matter of A-R-C-G-*, 128 HARV. L.R. 2090 (May 10, 2015).

leave their husbands” was not sufficient.⁶⁸ Furthermore, the lack of state action was a key factor in the determination.⁶⁹ The decision in the case was unusual, because Attorney General Sessions directed the BIA decision, rather than having the BIA issue the decision themselves.⁷⁰

Matter of A-B- was overturned by Attorney General Merrick Garland in 2021 but the controversy surrounding the case has not died, and the law is far from settled on the issue.⁷¹ A number of circuits that have ignored the Biden Administration’s new directions, and have continued to deny women with domestic violence claims asylum.⁷² On the other hand, some courts have moved the other direction and have come close to recognizing victims of gender-based violence as a per se PSG.⁷³ Immigration practitioners are currently scrambling to determine what is and is not the law in their jurisdiction, and immigration lawyers, government attorneys, and immigration judges are often unsure of what the applicable law is. This uncertainty has led to an uneven and unequal application of asylum law throughout the country and demonstrates how vulnerable the PSG category is to changing executive administrations.

Attorney General Sessions’ decision in *Matter of A-B* was widely panned by domestic violence and immigration advocates, but LGBT advocates were similarly disturbed about the possible implications for their community.⁷⁴ Just as *Matter of A-B* was made binding by Attorney

⁶⁸ *Matter of A-B-*, 27 I. & N. Dec. 316 (2018).

⁶⁹ *Matter of A-B-*, 27 I. & N. Dec. 316, 338 (2018).

⁷⁰ 20 Am. Jur. 2d Courts § 129 (explaining the situations in which AG opinions are binding).

⁷¹ *Matter of L-E-A- III*, 28 I&N Dec. 304 (AG 2021).

⁷² See *Murillo-Oliva v. Garland*, No. 21-3062, 2022 WL 14729879 (6th Cir. Oct. 26, 2022) (Where the court held that claims that were denied during the A-B- regime did not apply L-E-A on appeal) see also *Penaloza-Megana v. Garland*, No. 21-60363, 2022 WL 2315884 (5th Cir. June 28, 2022) (where the court refused to reevaluate a case based on A-B-).

⁷³ See *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020); see also *De Pena-Paniagua v. Barr*, 134 HARV. L. REV. 2574 (May 10, 2021).

⁷⁴ Press Release, Offices of Dianne Feinstein and Kamala D. Harris, Feinstein, Harris, *Colleagues Call on Sessions to Uphold Protections for LGBTQ Asylum Seekers Fleeing Persecution* (May 23 2018); Florence Project, *Our Statement on the Attorney General’s Decision in the Matter of A-B-*, FLORENCE PROJ. (Jan. 18, 2019) <https://firp.org/our-statement-on-the-attorney-generals-decision-in-the-matter-of-a-b/>.

General Sessions, *Matter of Toboso-Alfonso* was made binding by Attorney General Reno in 1994, it could be removed immediately at the whim of the next Attorney General,⁷⁵ leaving LGBT asylum seekers at the mercy of whoever happened to be in the White House at that point in time. Attorney General Sessions took a far more active role in determining BIA policy than previous administrations.⁷⁶ Under his supervision, the Attorney General used his appointment power to write more BIA decisions in 2018 than in all of the previous 10 years combined.⁷⁷ With the political right taking a more active role in dictating immigration policy through executive action, members of the LGBT community are rightfully concerned about what these developments could mean.

D. The private/public distinction laid out in Matter of A-B- creates another challenge for LGBT asylum seekers targeted by non-state actors.

Another troubling feature of *Matter of A-B-* is the emphasis on private versus public violence. While refugee law was initially targeted at state actors, this distinction proved impractical and insufficient to meet the needs of asylum seekers who were being oppressed by other groups.⁷⁸ U.S. asylum law provides that if the government of the asylee's home country is "unwilling or unable" to protect them, they may claim asylum.⁷⁹ While the law clearly provides this protection, as a practical matter, it is significantly more difficult to prove persecution by non-state actors.⁸⁰ This forms a significant problem, as many members of the global LGBT community face discrimination not from their governments, but from non-state actors that the

⁷⁵ Nora Snyder, *Matter Of A-B-, Lgbtq Asylum Claims, And The Rule Of Law In The U.S. Asylum System*, 114 NORTHWESTERN L.R. 809, 827 (2019).

⁷⁶ *Id.* at 834.

⁷⁷ *Id.*

⁷⁸ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).

⁷⁹ *Id.*

⁸⁰ Charles Shane Ellison & Anjum Gupta, *Unwilling Or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUM. RTS. L.R. 441, 442 (2021).

government does not wish to control.⁸¹ For example, Iraq is one of the major points of origin for LGBT asylees⁸² even though homosexuality has been decriminalized in Iraq since the 1960s.⁸³ Despite this de jure legality, LGBT Iraqis face violence at the hands of armed groups and many non-state actors. Armed Islamist groups such as ISIS and Hezbollah specifically target gays and lesbians, as members of state security forces often ignore abuses against the LGBT community.⁸⁴ If *Matter of A-B-* ignores action by non-state actors, then members of the LGBT community across the world are at risk.

Although the private/public actor distinction exists for other grounds beyond PSG, the courts tend to be less deferential when it comes to PSG claims. Case law about the exact standard for government inaction varies wildly based on circuit,⁸⁵ and the repeal of *Matter of A-B-* did not determine appropriate standards as AG Garland's opinion simply vacated the previous ruling.⁸⁶ In *A-B-*, the court conformed with the incredibly high *Galina v. INS* definition of persecution, requiring the government to be "completely helpless" in assisting someone for the actions to amount to persecution.⁸⁷ In contrast, in *Mashiri v. Ashcroft*, a nationality-based claim, the court found in favor of an Afghani family in Germany who had been targeted by Neo-Nazi groups.⁸⁸

⁸¹ Human Rights Watch, *Iraq: Impunity for Violence Against LGBT People*, HUM. RTS. WATCH (Mar. 23, 2022) <https://www.hrw.org/news/2022/03/23/iraq-impunity-violence-against-lgbt-people>.

⁸² Home Office, *Asylum claims on the basis of sexual orientation 2021*, HOME OFFICE <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2022/asylum-claims-on-the-basis-of-sexual-orientation-2021--2>.

⁸³ Home Office, *Foreign travel advice Iraq*, HOME OFFICE (last visited Apr. 2, 2023) <https://www.gov.uk/foreign-travel-advice/iraq/local-laws-and-customs>.

⁸⁴ *Id.*

⁸⁵ See *Matter of A-B-*, 28 I. & N. Dec. 199, 3 (2021) (discussing the wide diversity of opinions which discuss the relevant standard citing: *Guillen-Hernandez v. Holder*, 592 F.3d 883, 886-87 (8th Cir. 2010); *Kere v. Gonzales*, 252 F. App'x 708, 712 (6th Cir. 2007); *Shehu v. Gonzales*, 443 F.3d 435, 437 (5th Cir. 2006); *Hor v. Gonzales*, 421 F.3d 497, 501-02 (7th Cir. 2005); *Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1st Cir. 2007)) showing the different standards for evaluating persecution by non-state actors).

⁸⁶ *Matter of L-E-A- III*, 28 I&N Dec. 304 (AG 2021).

⁸⁷ *Id.*

⁸⁸ See, e.g., *Mashiri v. Ashcroft*, 383 F.3d 1112, 1116 (9th Cir. 2004); *Rodas-Mendoza v. I.N.S.*, 246 F.3d 1237 (9th Cir. 2001).

This case did not meet the 9th Circuit’s standard for state violence, and the 9th Circuit has stated that violence “completely untethered to a governmental system does not afford a basis for asylum”, but relief was granted anyway without a discussion of the standard.⁸⁹ Nothing close to the “completely helpless” PSG requirement was applied.

Thus, courts appear to be more hesitant about granting relief for violence done by non-state actors in PSG claims compared to in other claims (like nationality in *Mashiri*). One plausible reason is that because PSG as a category is so ill-defined, judges are stricter in their reading of requirements in order to avoid setting broad precedents. Therefore, the very ambiguity of the PSG definition leads judges to be stricter in application. While there is no guarantee that LGBT victims of private violence would fare better under a sixth ground of gender-based analysis than under the PSG analysis, it is possible that judges would feel more comfortable granting relief under a legal standard that is better defined.

III. Even Beyond Direct Legal Benefits, Practical Problems of Administrability and Fairness to LGBT Asylees Such as Ease of Litigation and Implicit Bias Would Be Improved Through a Sixth Ground for Asylum.

The complications created by the current PSG standard serve as an impediment for both immigration practitioners and pro se litigants in immigration courts.⁹⁰ Beyond the legal challenges discussed above, adding gender as a sixth ground would have the added humanitarian benefit of sparing applicants the pain of needing to understand one of the most complicated areas of asylum law: the PSG determination.⁹¹ PSG case law represents a significant issue for pro se litigants, and this complication is an undue burden which would not be present in cases based on

⁸⁹ *Id.*

⁹⁰ Tahirih Justice Center, *ADDING “GENDER” AS A SIXTH GROUND of ASYLUM Frequently Asked Questions* (last visited Apr. 2, 2023) https://www.tahirih.org/wp-content/uploads/2021/04/FAQs-Adding-Gender-as-a-6th-Ground-of-Asylum_-1.pdf.

⁹¹ *Id.*

the more straightforward grounds. A sixth ground would help LGBT petitioners craft claims as well as facilitate judicial throughput, making the appeals process easier and more transparent.

From the point of view of physicians, adding gender as a sixth grounds would be psychologically beneficial for asylees.⁹² A faster and less painful process for seeking asylum would limit the amount of questioning needed and would help alleviate some of the trauma inherent in the asylum process.⁹³ Most often, people seek asylum as the last resort. Denial of claims is a psychologically damaging event, and often refugees who are denied asylum face significant risks upon returning to their country of origin.⁹⁴ The risks of outing oneself in the immigration process further increase the potential danger back home, and the trauma of the proceedings.⁹⁵ By publicly declaring their gender identity at trial, applicants thus open themselves to significant risk—both legal and psychological.

In the interest of fairness to asylees, a sixth ground could reduce implicit bias in the asylum system. Immigration proceedings in the United State give strong deference to the immigration judges that are hearing the cases. This means that applications for asylum and their results can vary wildly based on the judge in question. The difference is so extreme that some judges have upwards of 90% grant rates for asylum claims, while others tend to hover around 5%.⁹⁶ This problem can rear its head for asylum seekers who face homophobic judges who abuse their discretion. For instance, in two separate occasions, the Second Circuit overturned decisions

⁹² Physicians for Human Rights, *Medical Evidence Highlights Urgency to Restore and Expand Legal Protections for Survivors of Domestic and Gang Violence who Seek Asylum in the United States*, PHYSICIANS FOR HUM. RTS. (June 9, 2021) <https://phr.org/news/medical-evidence-highlights-urgency-to-restore-and-expand-legal-protections-for-survivors-of-domestic-and-gang-violence-who-seek-asylum-in-the-united-states/>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ TRAC Immigration, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2017-2022*, TRAC (Oct. 26, 2022) <https://trac.syr.edu/immigration/reports/judge2022/>.

by one judge regarding claims by gay and bisexual men.⁹⁷ In the first instance, the court largely rooted its decision in a response to the issues of law upon which the judge based his denial.⁹⁸ In the second case, the court pointed its criticism towards the judge's candor in the courtroom and treatment of the opponent in cross-examination.⁹⁹ The judge made numerous disparaging remarks about the appellant's sexuality, and went so far as to make demeaning remarks about his genitalia and sexual performance.¹⁰⁰ The Second Circuit recommended that the judge be taken off future cases with LGBT applicants, arguing that allowing him to continue hearing these cases would not be in the interest of justice or the law.¹⁰¹

While it is commendable that the Second Circuit reprimanded this specific immigration judge for his continued egregious behavior, it is not possible for the circuit courts to review all claims for potential bias. There are over six hundred immigration judges across sixty-eight immigration courts.¹⁰² Furthermore, many of the people who apply for asylum are represented pro se.¹⁰³ Asylees who lack the means to obtain counsel likely lack the knowledge and capacity to take an appeal all the way to a court of appeals. Thus, it is important to tackle bias at the immigration judge level.

Implicit bias plays a role in immigration proceedings, just as it does in other areas of law.¹⁰⁴ However, this is particularly problematic in asylum, as immigration judges play a more

⁹⁷ *Id.*

⁹⁸ See generally *Walker v. Lynch*, 657 F. App'x 45.

⁹⁹ *Brown v. Lynch*, 665 F. App'x 19, 21 (2d Cir. 2016).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 22.

¹⁰² OFFICE OF THE CHIEF IMMIGRATION JUDGE, DEPT. OF JUSTICE (last visited Apr. 2, 2023)

<https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios#:~:text=OCIJ%20provides%20overall%20program%20direction,adjudications%20centers%20throughout%20the%20Nation.>

¹⁰³ Congressional Research Service, *U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs*, CONG. RSCH. SERV. (Jul. 6, 2022) <https://crsreports.congress.gov/product/pdf/IF/IF12158/3>.

¹⁰⁴ Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey & Justin Levinson, *Implicit Bias in the Courtroom*, 59 UCLA L.R. 1124, 1125 (2012).

active role in investigating the case than in other more traditional courtroom settings.¹⁰⁵ The power of immigration judges to cross-examine means they often serve as a second government attorney against the applicant and judicial cross-examination is often the primary method of determination for their cases. A sixth ground for asylum would not eliminate prejudice against LGBT asylum seekers but would require the judges to be aware that members of the LGBT community must be considered in determining who counts as a refugee. Hearing “or gender/sexuality” every time an applicant or their counsel read the standards for asylum would reinforce the idea in their mind, as research has shown that repeated exposure to exemplars of behavior can reinforce ideals and weaken bias.¹⁰⁶ Judges who are repeatedly reminded that gender-based claims are exemplars in the law may go a long way towards reducing implicit bias, which could result in better outcomes for LGBT asylees.

One of the greatest benefits of reconceptualizing gender and sexuality-based claims comes from visibility. Framing claims in terms of problems that are facing LGBT individuals is more humanizing than approaching them from the point of view of problems that people face because they are members of a distinguishable group of people. Beyond the practical legal reasons for adding a sixth ground, there is value in the legal system recognizing that individuals' problems are understood by the government. Writing about the problems women face while applying for asylum, immigration law scholar Talia Inlender argued that a sixth ground would empower women to seek redress for what has happened to them based more directly on who they are.¹⁰⁷ It would recognize the universality of harms that happen against women, and signal the

¹⁰⁵ See 8 CFR § 1003.10 (detailing the investigatory role of immigration judges).

¹⁰⁶ Félice van Nunspeet & Naomi Ellemers, *Reducing Implicit Bias: How Moral Motivation Helps People Refrain from Making “Automatic” Prejudiced Associations*, *Translational Issues in Psychological Science* 2015, 1, 382.

¹⁰⁷ Talia Inlender, *STATUS QUO, OR SIXTH GROUND: ADJUDICATING GENDER ASYLUM CLAIMS*, IN *MIGRATIONS AND MOBILITIES: CITIZENSHIP BORDERS, AND GENDER*, 366 (NYU Press, 2009).

government's drive to fix and eliminate these harms.¹⁰⁸ Similarly, adding gender/sexuality as a sixth ground would signal to the world that the United States is looking to be a leader in protecting the rights of the LGBT community.

IV. Adding Gender/Sexuality Would Protect the Intent of the Refugee Protocols

One of the principal benefits of adopting a sixth grounds for asylum would be to bring U.S. protections for LGBT people in line with the protections that are demanded by international law. While the United States has a rigid approach to using the PSG determination, most other countries are not as strict in their application of the rule. Instead, they take a broader approach to allowing individuals relief on PSG grounds. The United Nations High Commissioner for Refugees held a conference in 2002 to better define the PSG determinations, as the UN noted that there were wide discrepancies in the ways protocol parties were performing their duties to refugees applying under PSG grounds.¹⁰⁹ This committee resulted in a series of guidelines and recommendations that would better help member states meet their obligations.¹¹⁰ One recommendation was for countries to adopt an either/or approach to the question of social visibility and immutability, rather than requiring both, as the U.S. does.¹¹¹ Furthermore, they emphasized the inclusive nature of the PSG designation, proposing no additional requirements for cohesiveness, nor any requirements that all members of the same group must face danger.¹¹² They put no limits on size—for instance, they have “women” as a potential PSG, so long as women in a particular society demonstrably face danger.¹¹³

¹⁰⁸ *Id.*

¹⁰⁹ See Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2, HCR/GIP/02/02 (May 7, 2002).

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.*

¹¹² See generally *id.*

¹¹³ *Id.* at 3.

Not only does the United Nations support a gender-conscious view of asylum, but other peer nations and organizations find gender-based claims per se acceptable. The European Union (EU) Qualification Directive now provides in article 10(1)(d) that “[g]ender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.”¹¹⁴ This is a recent improvement from their previous standards, making it easier for people to launch gender-based claims in the EU.¹¹⁵ Similarly, New Zealand has through their common law implemented a per se rule on gender based claims, which they have expanded to LGBT asylum seekers.¹¹⁶ Mexico has gone a step further and explicitly enshrined gender as a sixth ground.¹¹⁷ These are just a few of the countries which have, in recent years, changed their law to facilitate gender-based asylum claims.

Opponents of the sixth ground say that this would bring the United States further away from international law (which only lists five enumerated grounds for asylum), and muddy the water of what is and is not considered a ground for relief.¹¹⁸ They claim that gender is already protected by the text and the original meaning of the PSG grounds, and that countries should look to UN guidelines rather than creating a new grounds.¹¹⁹ While these concerns have some merit, from the point of view of practicality, the PSG ground is overly broad, and judges are faced with advocates arguing new PSGs every day. In a PSG-based scheme, every new understanding of gender must be tied back to the PSG definition and adjudicated, whereas in a

¹¹⁴ Guy Goodwin-Gill & Jane McAdam, *THE REFUGEE IN INTERNATIONAL LAW* 110 (5th ed. 2021).

¹¹⁵ *Id.*

¹¹⁶ See *Refugee Appeal No. 915/92 Re SY* (29 August 1994) 9-10; *Refugee Appeal No. 74665, No. 74665*, New Zealand: Refugee Status Appeals Authority, 7 July 2004.

¹¹⁷ UNHCR Mexico, *Who is considered a refugee?* <https://help.unhcr.org/mexico/en/quien-es-una-persona-refugiada/> (last visited May 15, 2023).

¹¹⁸ Sabrineh Ardan & Deborah Anker, *Re-setting Gender-Based Asylum Law*, HARVARD LAW BLOG (Dec. 30, 2021) <https://blog.harvardlawreview.org/re-setting-gender-based-asylum-law/>.

¹¹⁹ *Id.*

scheme where gender and sexuality are explicitly protected, an immigration judge must simply tie the applicant's sexuality or gender identity to "gender/sexuality" as a ground. This would both be more efficient and would ensure that the U.S. is adjudicating gender and sexuality-based claims in the same general manner as other nations. Adding a sixth ground would also be a way for the United States to bypass the current legal and practical problems deeply rooted in the PSG ground.

Conclusion

Homophobia exists all over the world, and members of the LGBT community in some countries face existential threats to their lives and livelihoods. It is the responsibility of nations with the capacity to house such persecuted individuals to do so. The current asylum system in the United States has holes that leave LGBT asylees in dangerous positions where they are unable to seek relief. Some of these problems stem from the difficulty of making an asylum claim under the Particular Social Group grounds, while others stem from homophobia in society and in the asylum system.

Although a sixth ground for asylum would assist these individuals, legislators and the courts must continue to be vigilant to root out problems that arise from elsewhere in the immigration system. For instance, in recent years, the Biden Administration has continued numerous Trump-era policies that impose artificial barriers to asylum, including requiring those passing through third intermediate countries to first apply for asylum there before coming to the United States.¹²⁰ These practices are particularly problematic for LGBT asylum seekers who face homophobia from officials in these intermediate countries, and are not protected by their

¹²⁰ Katrina Eiland & Jonathan Blazer, *Biden Must Reverse Plans to Revive Deadly Trump-era Asylum Bans*, ACLU (Jan. 26, 2023) <https://www.aclu.org/news/immigrants-rights/biden-must-reverse-plans-to-revive-deadly-trump-era-asylum-bans>.

respective laws.¹²¹ Furthermore, lack of oversight in immigrant detention facilities leads to severe abuse for asylum seekers. Transgender asylees are often subject to physical and sexual abuse in detention centers, and are frequently kept in isolation for lengthy periods of time.¹²² As helpful as a sixth ground for asylum would be, it is not a panacea for all of the issues that unduly burden LGBT asylees. This is an area ripe for future research.

Nonetheless, as has been demonstrated above, adding gender and sexuality as a sixth protected ground for asylum would be an essential first step. Not only would a sixth ground better protect members of the LGBT community, but it would also better protect all victims of gender-based violence. If the United States wants to be a leader in global LGBT rights, it must serve as a refuge for people who are facing discrimination based on their sexuality and gender identity. The interests of justice, and better fulfilling the founding ideals of the 1951 Refugee Convention, would be best served with a sixth ground.

¹²¹ Heather Cassell, *Immigration advocates urge Biden to reconsider asylum policy*, GAY CITY NEWS (Feb. 28, 2023) <https://gaycitynews.com/immigration-advocates-urge-biden-reconsider-asylum-policy/>.

¹²² Sam Levin, *A trans woman detained by Ice for two years is fighting for freedom: 'I've been forgotten'*, THE GUARDIAN, <https://www.theguardian.com/us-news/2021/jun/09/a-trans-woman-detained-by-ice-for-two-years-is-fighting-for-freedom-ive-been-forgotten> (June 9, 2021).

Applicant Details

First Name **Olivia**
 Last Name **Schoffstall**
 Citizenship Status **U. S. Citizen**
 Email Address olivia_schoffstall1@baylor.edu
 Address

Address

Street
901 Arlington Drive
 City
Waco
 State/Territory
Texas
 Zip
76712
 Country
United States

Contact Phone Number **5402193580**

Applicant Education

BA/BS From **University of Virginia**
 Date of BA/BS **May 2017**
 JD/LLB From **Baylor University School of Law**
<http://www.baylor.edu/law/>
 Date of JD/LLB **April 27, 2024**
 Class Rank **15%**
 Law Review/Journal **Yes**
 Journal(s) **Baylor Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Baylor Law Faegre-Drinker Spring Moot Court Competition, 2022**
Judge John R. Brown Admiralty Moot Court Competition, 2023
National Veterans Law Moot Court Competition, 2022

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships **No**

Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Recommenders

Taylor, Holly
Holly.Taylor@traviscountytx.gov
(512) 496-8253

Yanowitch, Paul
paul_yanowitch@baylor.edu

Jaeger, Christopher
chris_jaeger@baylor.edu
615 440-0040

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

OLIVIA J. SCHOFFSTALL

901 Arlington Drive | Waco, TX 76712
(540) 219-3580 | olivia_schoffstall1@baylor.edu

May 11, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am writing to apply for a one-year clerkship position in your chambers beginning in August 2024. I am a rising third-year student at Baylor Law School, serving as the Managing Senior Executive Editor for the *Baylor Law Review*. I am a native Virginian and hope to serve my home state as a clerk. In the long term, I plan to practice litigation and hope to eventually serve as an assistant U.S. attorney.

I believe I can contribute to your chambers with my strong research and writing skills. My first-year legal writing received recognition, including the High A in my appellate legal writing class. This year, I have continued to develop my writing by competing in two moot court competitions and serving as a research assistant. My internship with the Travis County District Attorney's Office required extensive legal research and writing for criminal appellate cases. This builds upon my professional editorial, grant writing, and research experience.

Enclosed are my resume, law school transcript, and writing sample. The writing sample is an appellate brief examining the proper legal framework for IVF pre-embryo ownership. Additionally, I have enclosed letters of recommendation on my behalf from the following individuals:

Holly Taylor
Travis County District Attorney
Austin, Texas
Holly.Taylor@traviscountytexas.gov
(512) 496-8253

Professor Chris Jaeger
Baylor Law School
Waco, Texas
Chris_Jaeger@baylor.edu
(254) 710-6590

Professor Paul Yanowitch
Baylor Law School
Waco, Texas
Paul_Yanowitch@baylor.edu
(254) 710-3611

Please let me know if I can provide any other information that would be helpful. Thank you for your time and consideration.

Sincerely,



Olivia Schoffstall

OLIVIA J. SCHOFFSTALL

901 Arlington Drive, Waco, TX 76712 | (540) 219-3580 | olivia_schoffstall1@baylor.edu

EDUCATION

Baylor University School of Law , Waco, TX	2024
Candidate for Juris Doctor, GPA: 3.63, Class Rank: 22/198 (Top 11%)	
<i>Honors:</i>	High A: Federal Courts; Criminal Procedure; Persuasive Communication; Supreme Court Seminar Dean's List (six quarters) Baylor Barrister Society
<i>Advocacy:</i>	Judge John R. Brown Admiralty Moot Court Competition, March 2023 (Semi-finalist; Best Team Oral Advocates, 1 st Place; Best Brief, 3 rd Place; Best Oral Advocate, 4 th Place) National Veterans Law Moot Court Competition, November 2022
<i>Activities:</i>	<i>Baylor Law Review</i> (Managing Senior Executive Editor, 2023–24) Christian Legal Society (Vice President, 2022–23) Student Ambassador

Reformed Theological Seminary, Washington, D.C. 2018
Non-degree fellowship involving theological writing courses focused on vocation and service.

University of Virginia, Charlottesville, VA 2017
Bachelor of Arts in Economics & Minor in Religious Studies, GPA: 3.30
Honors: Dean's List
Study Abroad: University of Edinburgh, Edinburgh, Scotland, Fall 2015

EXPERIENCE

Hogan Lovells US LLP , Houston, TX	May–July 2023
<i>Summer Associate, Litigation, Arbitration, and Employment Group</i> (full-time)	
Baylor University School of Law , Waco, TX	January–May 2023
<i>Research Assistant to Professor Jessica Asbridge</i> (part-time) Conducted legal research for a 50-state survey of the application of state Excessive Fines Clauses.	
Travis County District Attorney's Office , Austin, TX	May–August 2022
<i>Legal Intern, Conviction Integrity Unit</i> (full-time) Conducted legal research and drafted memoranda assessing claims for actual innocence and wrongful conviction.	
Limestone County District Attorney's Office , Groesbeck, TX	April–May 2022
<i>Legal Intern</i> (part-time) Drafted charges, stipulations, memoranda, and responses to writs of habeas corpus. Conducted legal research.	
Prison Fellowship , Washington, D.C.	April–August 2022
<i>Legal Research Contractor</i> (part-time) Supported legislative research projects, including drafting criminal justice campaign and lobbying materials.	
<i>Advocacy External Relations & Project Manager</i> (full-time)	June 2018–July 2021
Provided project management for criminal justice reform campaigns in 14 jurisdictions. Oversaw federal and state lobby compliance for 250+ staff. Served as primary contact for coalition partners, funders, and media.	
Center for Public Justice , Washington, D.C.	September 2017–May 2018
<i>Assistant Editor, Shared Justice</i> (part-time) Managed <i>Shared Justice</i> writers and communications. Provided editorial review for all published articles.	

Other Experience: The Juice Laundry (*Smoothie Maker*); Ashoka (*Intern*, data analysis); Community Investment Collaborative (*Intern*, micro-loan advisement); Trinity Education (*Intern*, computer programming).

ADDITIONAL INFORMATION

Violinist, long-distance runner and road cyclist, Executive Producer of *A New Day 1* (documentary following people returning home after incarceration), conversational in Italian and Spanish, semi-professional house sitter.

OLIVIA J. SCHOFFSTALL

Baylor Law School

UNOFFICIAL LAW SCHOOL TRANSCRIPT

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Torts 1	Jim Underwood	A-	4	
Contracts 1	Larry Bates	B+	4	
Civil Procedure	Jeremy Counseller	B-	4	
LARC: Intro to Legal Writing	Matthew Cordon	A-	2	Part 1 of 2

Winter 2021-22

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts 2	Larry Bates	A	4	
Criminal Law	Paul Yanowitch	A-	3	
Property 1	Jessica Asbridge	B+	4	
Torts 2	Jim Underwood	B+	3	
LARC: Intro to Legal Writing	Matthew Cordon	A-	1	Part 2 of 2

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure	Paul Yanowitch	A	3	High A
Property 2	Jessica Asbridge	A	3	
Con Law: Individual Liberties	Brian Serr	A-	3	
LARC: Persuasive Comm.	Chris Jaeger	A	2	High A

Fall 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Trusts & Estates	Tom Featherston	B+	5	
Business Organizations 1	Elizabeth Miller	B+	5	
Tax & Accounting Principles	Christine Robinson	B+	2	
Supreme Court Seminar	Brian Serr	A	2	High A
Moot Court	Larry Bates	A	2	

Winter 2022-23

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Federal Courts	Paul Yanowitch	A	3	High A
Con Law: Structure & Powers	Brian Serr	A	4	
Alternative Dispute Resolution	Chris Jaeger	A	2	
Federal Administrative Law	Jessica Asbridge	A-	2	
LARC: Transactional Drafting	Kayla Landeros	A-	1	

Spring 2023

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Research	Matthew Cordon	A	3	
Complex Litigation	Jim Underwood	A-	3	
Conflict of Laws	Luke Meier	A-	3	
Remedies	Laura Hernandez	B+	3	
LARC: Litigation Drafting	Greg White	A-	1	
Moot Court	Lee Ann James	A	2	



**OFFICE OF THE
DISTRICT ATTORNEY**

P.O. Box 1748, Austin, TX 78767

Telephone 512/854-9400

Telefax 512/854-4206

JOSÉ P. GARZA
DISTRICT ATTORNEY

TRUDY STRASSBURGER
FIRST ASSISTANT

November 19, 2022

To Whom It May Concern:

I am writing to share with you the stellar qualifications of Baylor law student Olivia Schoffstall. I had the pleasure of working closely with Olivia last summer when she served as a summer intern in the Travis County District Attorney's Office's Conviction Integrity Unit (CIU) from May to August of 2022.

While serving as an intern in the CIU, Olivia worked diligently on every project assigned to her. She frequently made the arduous drive down I-35 to Austin so that she could work closely with our team in the office. Olivia participated in our weekly team meetings and quickly became a crucial part of our CIU Team. We valued her clever insights, strong work ethic, keen intelligence, compassion, and pleasant demeanor. Despite the sometimes-tense nature of the work, Olivia remained unruffled and often offered to help with whatever challenges the CIU was facing. It was difficult for our CIU team to say goodbye to Olivia when she completed her internship!

Olivia's experience managing a large team and heavy workload with the Prison Fellowship showed in her exceptional organizational and time-management skills. Each time Olivia received a CIU assignment, she worked independently and diligently on the task, requiring no oversight. I was astounded by how many projects she completed for the CIU in such a brief time. She finalized at least eight substantive research memos, including both case-specific topics and legal research with broader applicability to the CIU's work.

November 19, 2022 Page 2 of 2

Olivia's prior experience drafting and editing research reports was evident in her high-quality work product. Each of Olivia's memos was carefully researched, well-reasoned, factually accurate, and free of clerical errors. Her writing was always succinct and easily understandable, yet comprehensive in its consideration of the applicable law and facts. I have never seen such extraordinary written work from an intern.

I found myself assigning Olivia increasingly complex projects as the summer went on and each time she rose to the challenge. I was reviewing certain aspects of the CIU's procedures. Olivia assisted me in this endeavor by conducting a nationwide survey of other CIUs' intake forms. In addition, she made recommendations for our CIU's intake process and drafted a template for a new intake form for our unit.

I have spent several years of my career as a staff attorney for an appellate court. Based on that history and my experience working with Olivia, I believe that her research and writing skills, dedication to public service, ability to simplify and clarify complicated subjects, strong work ethic, and genial demeanor make her the perfect candidate for a judicial clerkship.

Please feel free to contact me with any questions about Olivia.

Best Regards,

A handwritten signature in black ink that reads "Holly E. Taylor". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Holly Taylor
Assistant Director, Civil Rights Division
Travis County District Attorney's Office

May 15, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am extremely pleased to write a letter supporting Olivia Schoffstall in her effort to secure a clerkship in your chambers. Over the past year Ms. Schoffstall was an active and exceptionally engaged student in my Criminal Law and Criminal Procedure classes. As evidenced by her resume, she did very well in both classes -- indeed, she received the "high A" in Criminal Procedure -- and has had similar success in her other first-year classes. But it is not (just) Ms. Schoffstall's impressive intellectual ability that leads me to recommend her to you; it is her exceptional motivation and maturity as well.

Initially, Olivia came to my attention as a result of her contributions during class. As I expect you recall, most students, and particularly first-year students, participate in class only when called on. It has been my experience that in each class there are one or two students at most who prove the exception and yet whose contributions invariably are outstanding. Olivia was that student in her classes. She not only regularly and respectfully contributed to the class discussion, but more importantly, she was willing to engage me when I posed questions or took positions that were intended to illustrate the difficulty of extending principles to unforeseen or unusual circumstances and the ever-present problem of "drawing lines" in a common-law system. What most impressed me was not just that Olivia chose to contribute when the discussion became most difficult and provocative, but that her contributions, almost always insightful, always were respectfully argued. All of this made her stand out from her classmates.

I also have had the opportunity to meet with Olivia several times outside of class. Most of these meetings, as one might expect, related to issues raised in class, and in our discussions Olivia, again, demonstrated a keen intellect. What struck me was not just that she had uncommon insight for a first-year law student, but that she fully embraced the weight of the competing arguments on difficult issues and was struggling to identify how we do resolve and perhaps otherwise should resolve such problems -- and that she was doing so out of a genuine desire to learn, and not because the issue might be on an examination.

I also learned through our discussions that Olivia has a passion for public service and in particular a strong interest in becoming a prosecutor. Having worked for the United States Department of Justice for 30-plus years, the last 14 or so as a federal prosecutor, I admittedly am somewhat biased toward students who express an interest in public service. Olivia made it clear that her experiences in public service, including her tenure with the Prison Fellowship and especially her recent internships with two District Attorneys' offices, have convinced her to pursue (following a clerkship, hopefully) a career as a prosecutor, and to use the extraordinary powers and discretion delegated to prosecutors to further the public good. I whole-heartedly commend Olivia for this, and believe it is a powerful testament to her character and faith.

As her resume documents, and as I have adverted to above, prior to coming to law school Olivia held positions in several public interest organizations that demanded great resolve and patience. I believe that these have given Olivia a perspective and maturity that few of her classmates can match. They also demonstrate, I submit, how seriously Olivia views the obligations that as a lawyer of faith she has to others and especially the less fortunate. Again, I think this distinguishes Olivia from many if not most law students and lawyers.

One other thing about Olivia deserves special mention: she is an excellent writer. In both my classes I require students submit a written assignment intended to force them to produce a pithy, terse discussion of legal issues in a practical setting. The written work Olivia submitted to me were excellent examples of effective legal writing. It has been my experience over 35-plus years of practice and several years teaching that most lawyers and law students are not particularly good writers. I found Olivia's written work to be clear, concise, and professional, which is consistent with her having received consistently high grades in her first-year writing courses (LARC 1 -3).

Many years ago I was fortunate enough to serve as a judicial clerk to a federal judge. As I remember it, that was one of the most intellectually engaging and valuable professional experiences in my life. I am confident that Olivia, if given the opportunity, will quickly prove herself to be a valuable and trusted member of your chambers. I can say without reservation that she has the intellectual ability, discernment, and judgment that a federal judge rightly demands in judicial clerks.

For all these reasons, I commend Ms. Schoffstall to you without reservation. If I can be of any further assistance, please do not hesitate to contact me at your convenience.

Sincerely,

Paul Yanowitch
Adjunct Professor of Law
Baylor Law School
(410) 703-8415

Paul Yanowitch - paul_yanowitch@baylor.edu

May 15, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to express my strong support for Olivia Schoffstall's application to serve as your judicial law clerk. Olivia was a star student in my Spring 2022 legal writing class (titled "LARC 3: Persuasive Communication"), earning the top grade by a comfortable margin. Olivia's work in my class was as strong as any student work I have received at Baylor Law School or in my previous position teaching legal writing at NYU School of Law—she ranks among the top two to three legal writers I've had the privilege of teaching. Beyond her exemplary research and writing skills, Olivia is consistently congenial, humble, hardworking, and genuinely intellectually curious. Having served as a judicial law clerk myself, I believe Olivia has all of the skills and attributes needed to excel in a clerkship—I was thrilled to learn she is applying, as I hoped she would choose to do so. I recommend Olivia enthusiastically and without reservation.

LARC 3: Persuasive Communication is a first-year course designed to develop students' skills in research, legal analysis, writing, and oral advocacy. The course focuses specifically on appellate brief writing and argument. Olivia and her classmates independently researched and wrote 20-page briefs advocating for one side of a dispute about the disposition of a divorcing couple's frozen pre-embryos. The case was (deliberately) messy, forcing the students to sort through issues of law they had not yet encountered in their coursework. The students worked on a tight timeline, with the quarter starting February 8, a first draft due March 18, and a revised brief due on April 14. Further, during this period, students delivered at least five oral arguments on the case through the Faegre Drinker Moot Court competition. Olivia's work exceeded all expectations on all fronts. Her brief was not just the strongest in her class, but one of the strongest two to three pieces of student writing I have ever received—thorough, clear, and to the point, demonstrating impressive research and strong analytical abilities. Much of the brief read to me more like the work of an early-career attorney than a 1L. Based on my observations, Olivia is similarly skilled as an oral advocate. She grasps how to "think like a lawyer"; she has a knack for piecing together ideas and arguments and relaying them in a clear, persuasive manner.

In addition to Olivia's impressive intellectual abilities, she was a pleasure to have as a student. She was a regular participant in class discussions, always sure to ask a particularly incisive or thoughtful question about the topic at issue. She demonstrated genuine curiosity for each topic we discussed. I am completely confident Olivia would be a congenial and supportive clerk who would be fully engaged with the work of your chambers.

In sum, Olivia is one of the strongest students I've had the privilege to teach. I highly recommend Olivia based on her intelligence, strong legal research, analytical, and writing skills, conscientiousness, and congeniality. If you have any additional questions or if there is any additional information I can provide in support of her application, please do not hesitate to contact me, either by phone (615-440-0040) or by email (Chris_Jaeger@baylor.edu).

Sincerely,

Christopher Brett Jaeger

Christopher Jaeger - chris_jaeger@baylor.edu - 615 440-0040

OLIVIA J. SCHOFFSTALL

901 Arlington Drive, Waco, TX 76712 | (540) 219-3580 | olivia_schoffstall1@baylor.edu

WRITING SAMPLE

The following writing sample is a brief to the Supreme Court of Texas from my persuasive legal writing class. The brief argues for the nonenforcement of an IVF informed consent form based on Texas legislative policy, precedent, and the parties' lack of mutual assent. I received the High A for this brief. The content has not been substantively edited since submission.

No. 21-BLS001

In the Supreme Court of Texas

AXEL B.,

Petitioner,

v.

REANNA B.,

Respondent.

**On Petition for Review from the
Court of Appeals for the Fifteenth District of Texas**

RESPONDENT'S BRIEF ON THE MERITS

Olivia Schoffstall
Professor Jaeger
Attorney for Respondent
April 14, 2022

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TABLE OF AUTHORITIES

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Tex. Fam. Code Ann. § 160.706	7, 12
Tex. Fam. Code Ann. § 160.751	6
Tex. Fam. Code Ann. § 160.754	<i>passim</i>
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Tex. Fam. Code Ann. § 160.756	<i>passim</i>
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Cases

<i>A.Z. v. B.Z.</i> , 725 N.E.2d 1051 (Mass. 2000)	<i>passim</i>
<i>Bilbao v. Goodwin</i> , 217 A.3d 977 (Conn. 2019)	5, 13
<i>Curlee v. Walker</i> , 244 S.W. 497 (Tex. 1922)	6
<i>Dahl v. Angle</i> , 194 P.3d 834 (Or. Ct. App. 2008)	13
<i>Davis v. Davis</i> , 842 S.W.2d 588 (Tenn. 1992)	2, 16, 20
<i>In re Hawthorne Townhomes, L.P.</i> , 282 S.W.3d 131 (Tex. App.—Dallas 2009, no pet.)	16
<i>In re Marriage of Rooks</i> , 429 P.3d 579 (Colo. 2018)	<i>passim</i>
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<i>J.B. v. M.B.</i> , 783 A.2d 707 (N.J. 2001)	<i>passim</i>
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<i>Kass v. Kass</i> , 696 N.E.2d 174 (N.Y. 1998).....	13
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<i>Patel v. Patel</i> , 2017 WL 11453591 (Va. Cir. Ct. Sept. 7, 2017)	19
<i>Roach v. Dickenson</i> , 50 S.W.3d 709 (Tex. App.—Eastland 2001, no pet.)	17
<i>Roman v. Roman</i> , 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)	11–13
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<i>Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes</i> , 84 Minn. L. Rev. 55 (1999)	18

ISSUES PRESENTED

- I. Whether the balancing-of-interests approach is the proper legal framework for determining the disposition of frozen pre-embryos when one party has a change of heart after entering an agreement that requires them to procreate.
- II. Whether the balancing-of-interests approach is the proper legal framework to apply when the parties lack an enforceable agreement governing the disposition of their remaining frozen pre-embryos in the event of divorce.

STATEMENT OF JURISDICTION

This appeal was taken from a final judgment of the Court of Appeals for the Fifteenth District of Texas. This Court has appellate jurisdiction pursuant to Tex. Gov't Code § 22.001. Tex. Gov't Code § 22.001.

STATEMENT OF FACTS

I. Factual Background

Reanna B. (respondent) and Axel B. (petitioner) were married in 2011. J.A. at 5. Reanna struggled to become pregnant. J.A. at 5. Looking for alternatives, she underwent an examination by Dr. Maxine Fusewood at the Assisted Reproduction Services Center of Ricken County (the Center). J.A. at 5. Dr. Fusewood advised the couple that In Vitro Fertilization (IVF) could significantly increase Reanna's chances of becoming pregnant due to her scarred fallopian tubes and ovarian insufficiency.¹ The parties decided to try for a biological child through IVF and scheduled the procedure for November 2016. J.A. at 7.

During a brief, 20-minute office visit before the first IVF procedure, the Center required Reanna and Axel to sign nine different forms. J.A. at 7. Among the forms was the "Informed Consent for Cryopreservation of Pre-Embryos," a four-page single-spaced document describing the cryopreservation process and the procedure's risks.² The form also provided instructions for cryopreserved pre-embryos in the event of certain contingencies. J.A. at 38. It offered six options for the disposition of frozen pre-embryos after divorce. J.A. at 38.

Before this visit, Axel independently considered the pre-embryos' disposition in the event of divorce. J.A. at 8. He decided he would be comfortable donating the

¹ IVF consists of a series of procedures to collect and fertilize a woman's eggs, resulting in pre-embryos. "Pre-embryo" is the medical term for a fertilized egg that has not been implanted in a uterus. The pre-embryo develops fully only if it is implanted, after which a viable pregnancy may occur. J.A. at 4, 6.

² Pre-embryos are either implanted in a uterus or cryopreserved for possible future use. J.A. at 6.

pre-embryos to another IVF couple. J.A. at 8. When signing the form, Axel suggested they select the option to donate the pre-embryos anonymously if they divorced. J.A. at 8. Reanna signed the form without giving that question much thought. J.A. at 8. She only agreed with Axel's decision because she wanted to move forward with the IVF process. J.A. at 9. Divorce was the last thing on her mind. J.A. at 8.

After the Center obtained Reanna and Axel's consent, the couple began the IVF process and produced ten pre-embryos. J.A. at 8. Reanna underwent two unsuccessful rounds of implantation using four of the ten pre-embryos. J.A. at 8. At that point, Axel decided that he did not want to do the procedure again. J.A. at 8. Reanna disagreed, and the couple's relationship deteriorated. J.A. at 8. They separated in July 2019 and filed for divorce soon after. J.A. at 8. In the divorce proceeding, Reanna and Axel disputed the proper disposition of the remaining six pre-embryos generated through the parties' participation in IVF. J.A. at 4.

II. Procedural History

The parties filed competing motions for summary judgment and stipulated the treatment of the pre-embryos as "property with special dignity."³ Reanna argued that the informed consent form should not govern this dispute and that the court should apply the balancing-of-interests test instead. J.A. at 10. She desires to use the pre-embryos in additional IVF rounds and resents that another couple should have her pre-embryos. J.A. at 9. Meanwhile, Axel argued that the court should enforce the

³ Treating pre-embryos as "property with special dignity" occupies an interim legal category applied by most courts to consider this issue. *See, e.g., Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (describing pre-embryos as occupying "an interim category that entitles them to special respect because of their potential for human life").

informed consent form. J.A. at 10–11. Alternatively, he argued that the Center should continue to store the pre-embryos until the parties agree on a disposition. J.A. at 11.

The trial court granted Reanna’s motion for summary judgment and denied Axel’s motion. J.A. at 11. The court then issued a final divorce decree awarding the pre-embryos to Reanna. J.A. at 11. Axel appealed, and the Court of Appeals affirmed. He then filed a petition for review to the Texas Supreme Court. J.A. at 11.

SUMMARY OF THE ARGUMENT

The law exists to protect humans. To achieve this purpose, the law must account for human nature. And for better or worse, a fundamental aspect of being human is changing one’s mind. The ability to reconsider and improve is crucial to human identity and survival. Laws that ignore or penalize this reality in matters as intimate as procreation are ineffective and unethical.

This case is about recognizing the humanity of Texans seeking to build a family. This Court should affirm because Texas policy and precedent support the application of the balancing-of-interests test when one party has a change of heart after entering an agreement that would force them to procreate. In the alternative, the balancing-of-interests test is the appropriate legal framework to apply when the parties lack an enforceable agreement governing the disposition of their remaining pre-embryos in the event of divorce.

The balancing-of-interests test embodies principles codified in Texas law in two ways. First, Texas legislative policy gives effect to a party’s change of heart in other procreation agreements. Second, Texas legislative policy indicates a role for courts in

similar contexts, warranting the application of the balancing-of-interests test here. Notably, the *Roman* court's analysis of Texas policy should not extend to this case because it ignores pertinent provisions in the Texas Family Code (TFC) and provides an inadequate remedy for this case.

Further, applying the balancing-of-interests test is consistent with precedent. Enforcing Reanna and Axel's agreement would be inconsistent with precedent in this state and other jurisdictions by forcing Reanna to become a genetic parent. Additionally, most courts have rejected the mutual contemporaneous consent approach because it fails to resolve disputes effectively.

In the alternative, courts have applied the balancing-of-interests test absent an enforceable agreement. Courts have refused to enforce informed consent forms as binding divorce agreements when they lacked mutual assent. Because the parties' informed consent form lacks mutual assent, this Court should apply the balancing-of-interests test.

STANDARD OF REVIEW

The standard of review for summary judgment is de novo. *Mid-Century Ins. Co. of Texas v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007). When the parties both moved for summary judgment at trial and the court granted one while denying the other, the court of review will "determine all questions presented and render the judgment the trial court should have rendered." *Id.*

ARGUMENT

I. **This Court should affirm because Texas policy and precedent support the application of the balancing-of-interests test when one party has a change of heart after entering an agreement that would force them to procreate.**

Courts have considered three pathways to resolve the disposition of frozen pre-embryos upon the divorce of the progenitors. *Bilbao v. Goodwin*, 217 A.3d 977, 984–96 (Conn. 2019) (reviewing the approaches). First, under the balancing-of-interests test, the court weighs each party’s interests and desires for the pre-embryos. *Id.* at 985. Second, courts applying the contractual approach presume agreements between the progenitors governing the disposition of the pre-embryos are valid and enforceable in disputes between the couple. *Id.* at 984. Lastly, the mutual contemporaneous consent approach requires the parties to agree to a disposition of the pre-embryos; otherwise, the pre-embryos remain in storage indefinitely. *Id.* at 985.

Most courts have chosen to apply the balancing-of-interests test or the contractual approach. *See, e.g., Bilbao*, 217 A.3d at 986 (applying the contractual approach); *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001) (applying the balancing-of-interests test). In doing so, courts have explicitly rejected the mutual contemporaneous consent approach for two reasons. *See, e.g., In re Marriage of Rooks*, 429 P.3d 579, 592 (Colo. 2018), *cert. denied*, 139 S. Ct. 1447 (2019) (rejecting the mutual contemporaneous consent approach). First, this approach is unrealistic because the parties would not be in court if they could reach a mutual decision for the disposition of their pre-embryos. *Id.* at 589. Second, the party opposing the other